Aka v. Washington Hospital Center: Why the Debate over Pretext Ended with *Hicks*

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For several years, there has been a debate in the federal circuit courts over how an employment discrimination plaintiff survives summary judgment at the pretext stage. Specifically, courts are split over the type of evidence plaintiffs can present at the pretext stage. Is discrediting the defendant's explanation for the alleged adverse action with circumstantial evidence enough to create a genuine issue of fact that discrimination occurred? Or must a plaintiff present direct evidence of discrimination to survive summary judgment?

This Case Comment argues that the D.C. Circuit's opinion in Aka v. Washington Hospital Center *demonstrates that, to date, most circuit courts have failed to recognize that the debate over pretext should have ended with the Supreme Court's decision in* St. Mary's Honor Center v. Hicks. *This discussion of* Aka *will show two things. First, under* Hicks, *a plaintiff may survive summary judgment without direct evidence. Second, a careful reading of* Hicks *reveals that a plaintiff survives summary judgment without direct evidence if her proof of pretext raises an issue of material fact over the defendant's credibility, which then combines with circumstantial evidence in the prima facie case to permit an inference of discrimination. Because issues of credibility are for a jury to decide, in such situations lower courts do not have the discretion to require plaintiffs to present direct evidence of discrimination. As a result, the* Aka *analysis offers the federal courts a long overdue resolution to the debate over how a plaintiff survives summary judgment at the pretext stage.*

I. INTRODUCTION

The time-honored *McDonnell Douglas* framework[1] has come under fire in the last few years.[2] At issue is what kind of evidence can an employment

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[1] The Supreme Court established this framework in two decisions over a period of almost ten years. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[2] Although the *McDonnell Douglas* framework was built upon Title VII claims, it also applies to claims under other anti-discrimination statutes. *See* Koger v. Reno, 98 F.3d 631, 633 (D.C. Cir. 1996) (holding the *McDonnell Douglas* framework applies to Age Discrimination in Employment Act (ADEA) claims); *see also* DeLuca v. Winer Indus., Inc., 53 F.3d 793, 797 (7th Cir. 1995) (concluding the *McDonnell Douglas* framework applies to Americans with Disabilities Act (ADA) cases); Barth v. Gelb, 2 F.3d 1180, 1186 (D.C. Cir. 1993) (holding that because the Rehabilitation Act is a related statute, the *McDonnell Douglas* framework also

discrimination plaintiff present to survive summary judgment.[3] Specifically, does discrediting a defendant's explanation of the adverse action[4] with circumstantial evidence ever create a genuine issue of material fact that discrimination occurred? Or does a court have the discretion to require a plaintiff to present additional, or direct, evidence of discrimination to survive summary judgment?[5] In what follows, I will argue that the D.C. Circuit correctly answers these questions in the recent opinion of *Aka v. Washington Hospital Center*.[6] The D.C. Circuit held that a plaintiff may survive summary judgment without direct evidence if her[7] proof

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applies in employment discrimination claims).

[3] *See* FED. R. CIV. P. 56(c). To prevail on summary judgment, the moving party must establish that there is no genuine dispute to any material fact and as such the movant is entitled to judgment as a matter of law. *See id.* The motion raises the same legal inquiry as a motion for judgment as a matter of law under FED. R. CIV. P. 50(a). But summary judgment is decided before trial based upon documentary evidence, where as judgment as a matter of law is decided at trial based upon evidence submitted. *See* Lynne C. Hermle, *Summary Judgment Motions in Discrimination Cases: Bringing, Defending and Appealing, in* EMPLOYMENT LITIGATION 1997, at 877, 950 n.2 (PLI Litig. & Admin. Practice Course Handbook Series No. 592, 1997) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). Hermle discusses in her article how summary judgment is becoming "the tool of choice" for defendants. *See id.* at 895. Because summary judgment establishes undisputed material facts, defendants view summary judgment as an opportunity to compel dismissal of some or all of a plaintiff's claim. *See id.* Moreover, it is a chance for defendants to avoid the substantial cost of trial and potential damages, which often outweigh the expense of filing for summary judgment. *See id.* On the other hand, Hermle notes that plaintiffs are less likely to file summary judgment motions. *See id.* This difference can be explained by the distribution of burdens under the *McDonnell Douglas* framework. Plaintiffs have the burden of persuading the trier of fact that they are victims of intentional discrimination. Therefore, because plaintiffs have the duty of establishing genuine disputes over material facts, they are less likely to argue there is no dispute.

[4] As will be explained, to discredit the defendant's explanation is referred to as "proof of pretext." Pretext is a false reason or motive that an individual proffers to hide the actual or stronger reason or motive. *See* BLACK'S LAW DICTIONARY 1187 (6th ed. 1990). Therefore, in the employment discrimination context, proof of pretext is evidence that the employer's proffered reason is not the real reason for its adverse action. The inference drawn from this is that the defendant gave a false reason to cover-up discrimination. *See infra* text accompanying notes 35–37; *see also infra* note 42 (discussing how the D.C. Circuit uses the term "pretext" in *Aka*).

[5] *See infra* text accompanying notes 30–43. The *McDonnell Douglas* framework creates two opportunities for defendants to prevail on summary judgment. First, if the plaintiff fails to make a prima facie case. Second, if she fails to satisfy her burden of persuasion after the defendant rebuts the presumption of discrimination with a nondiscriminatory reason. This is an important distinction because no court has questioned whether a plaintiff should survive summary judgment if she cannot even make a prima facie case of discrimination. Thus, the real issue of debate over the *McDonnell Douglas* framework is what evidence must a plaintiff present to satisfy her burden once the defendant rebuts her prima facie case of discrimination.

[6] 156 F.3d 1284 (D.C. Cir. 1998) (en banc).

[7] The author takes the privilege of using the feminine pronoun to refer to unnamed individuals. The word choice is a concise alternative to "he/she" and is to be regarded as gender

of pretext raises an issue of material fact over the defendant's credibility, and then combines that with the evidence presented in the prima facie case to permit an inference of discrimination.[8] Under the *Aka* analysis, because issues of credibility are for a jury to decide, in such situations lower courts do not have the discretion to require plaintiffs to present direct evidence of discrimination.[9]

The *McDonnell Douglas* framework consists of a three-prong test that distributes the burdens of proof and production between plaintiffs and defendants.[10] The plaintiff has the initial burden of proving a prima facie case of discrimination, and then the defendant has the burden of producing sufficient evidence to establish a nondiscriminatory reason for the action. The plaintiff has the final burden of proving that the defendant's reason is a pretext and the real reason is discrimination.[11] In *McDonnell Douglas*, the Court provided a number of examples of circumstantial evidence for plaintiffs to present at the pretext stage, thereby suggesting that a plaintiff could satisfy her burden of proof by establishing an inference of discrimination.[12] However, the Supreme Court raised

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inclusive.

[8] *See Aka*, 156 F.3d at 1292.

[9] *See id.* at 1299 (concluding that credibility is "an issue that is quintessentially one for the fact finder").

[10] Lower courts apply the *McDonnell Douglas* framework to expedite the disposition of an employment discrimination claim. For further discussion of the framework, see *infra* notes 19–43 and accompanying text.

[11] This prong of the *McDonnell Douglas* framework is generally called the "pretext stage" and will be referred to as such throughout this Case Comment. *See generally* Ruth Gana Okediji, *Status Rules: Doctrine as Discrimination in a Post-*Hicks *Environment*, 26 FLA. ST. U. L. REV. 49, 68 (1998) (arguing that the impact of *Hicks* is that plaintiffs in race discrimination cases must prove a causal link exists between race and the adverse employment decision); *see also* Alfred W. Blumrosen et al., *Downsizing and Employee Rights*, 50 RUTGERS L. REV. 943, 943 n.8 (1998) (arguing that the loss of jobs in America through the downsizing process has resulted in the loss of employees' civil rights); Julie Tang & Honorable Theodore M. McMillian, *Eighth Circuit Employment Discrimination Laws:* Hicks *and its Impact on Summary Judgment*, 41 ST. LOUIS U. L.J. 519, 522 (1997) (discussing the state of employment law litigation in the Eighth Circuit during the post-*Hicks* era); Daniel W. Zappo, *A Causal Nexus Approach to Title VII Disparate Treatment Claims*, 50 RUTGERS L. REV. 1067, 176–77 (1998) (suggesting the *McDonnell Douglas* framework be abolished from employment law litigation).

[12] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973). The Supreme Court's holding in *McDonald Douglas* permitted plaintiffs to take their claims to a jury even if they lacked direct proof of intentional discrimination. *See id.* The Court stated that a plaintiff should have a "full and fair opportunity" to prove the defendant's reasons were false and thereby permit an inference of discrimination. *See id.* For example, a plaintiff who is African-American could present evidence of how she was treated by the employer in the past, how her African-American co-workers have been treated, or even an employer's general policies that reflect a different treatment for African-American employees than white employees. *See id.* How the employer has treated the plaintiff and other African-American employees could convince the trier of fact that there was a pattern of discriminatory animus from the employer

doubts about whether this interpretation was correct when it held in *Texas Department of Community Affairs v. Burdine*[13] that a plaintiff could satisfy her burden at the pretext stage by presenting either circumstantial or direct evidence.[14] The problem is that the Supreme Court failed to clarify when a plaintiff could rely on circumstantial evidence and who made that determination.[15] Did *Burdine* give plaintiffs the discretion to rely on circumstantial evidence to prove pretext and make an inference of discrimination if they do not have direct evidence of the defendant's discriminatory motive? Or did *Burdine* give discretion to the lower courts to decide whether a plaintiff was required to present direct evidence of discrimination to survive summary judgment at the pretext stage?

Although the Supreme Court had the opportunity to address the issue of how a plaintiff survives summary judgment again in *St. Mary's Honor Center v. Hicks*,[16] the Court failed to take full advantage of this opportunity. The Court settled the debate in part by holding that a plaintiff may combine proof of pretext with evidence from the prima facie case to make a sufficient showing of intentional discrimination.[17] Thus, *Hicks* affirmed that under the *McDonnell Douglas* framework, a plaintiff has the opportunity in the appropriate situation to satisfy her burden of proof at the pretext stage even if she lacks direct evidence of the defendant's discriminatory motive. However, the Supreme Court neglected to clarify which situations are appropriate. Therefore, the same questions that arose after *Burdine* remained after *Hicks*: When can a plaintiff rely upon circumstantial evidence to satisfy her burden of proof at the pretext stage? Or do lower courts have the discretion to decide whether a plaintiff can rely on circumstantial evidence or require her to present direct evidence of discrimination to survive summary judgment?

The lack of guidance from the Supreme Court regarding how a plaintiff survives summary judgment at the pretext stage has created a split in the circuit

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and thus permit an inference of discrimination.

[13] 450 U.S. 248 (1981).

[14] *See id.* at 256.

[15] There is a great distinction between direct and circumstantial evidence. Direct evidence of intentional discrimination is proof that the defendant's action was motivated by a discriminatory animus—i.e., based on race, sex, or religion. For example, a statement about race in the context of the adverse action would suffice as direct evidence of discrimination. On the other hand, circumstantial evidence does not show that the employer was motivated by discrimination per se, but rather shows that the defendant was more likely than not motivated by discrimination. The Supreme Court noted in *McDonnell Douglas* that circumstantial evidence would include how the employer treated the plaintiff in the past or past treatment of other employees in the same protected class. *See* discussion *supra* note 12.

[16] 509 U.S. 502 (1993).

[17] *See id.* at 511 (holding that in such situations, proof of pretext allows courts and the trier of fact to infer intentional discrimination without requiring additional proof).

courts.[18] At one extreme, some courts hold that a plaintiff never has to present additional evidence of discrimination once she proves the defendant's reason is a pretext. At the other extreme, some courts require that, in addition to proving pretext, the plaintiff must present additional, or direct, evidence of discrimination. Finally, in the middle are those courts that hold that in the appropriate situation, a plaintiff's burden of proof is satisfied if a trier of fact can infer discrimination from proof of pretext combined with the evidence in the prima facie case.

In this Case Comment, I will argue that the D.C. Circuit's opinion in *Aka v. Washington Hospital Center* demonstrates that, to date, most circuit courts have misinterpreted *Hicks* and thus have failed to recognize that the debate over pretext should have ended with that decision. My discussion of *Aka* will show two things. First, under *Hicks*, a plaintiff may survive summary judgment without direct evidence. Second, a plaintiff survives summary judgment without direct evidence if her proof of pretext raises an issue of material fact over the defendant's credibility, which then combines with the evidence presented in the prima facie case to permit an inference of discrimination. Part II gives the debate over pretext some context by briefly expanding upon how the *McDonnell Douglas* framework was established and then explaining why the debate over the pretext stage subsequently developed. Part III discusses the Supreme Court's decision in *Hicks* and then addresses why this decision has widened the split between the circuits over what role proving pretext and circumstantial evidence plays in satisfying a plaintiff's burden of proof. In Part IV, I will explain the recent interpretation of *Hicks* by the D.C. Circuit, and then argue that this interpretation correctly shows that the debate over pretext should have ended with *Hicks*.

In Part V, I will conclude with three reasons why *Aka v. Washington Hospital Center* is significant to employment discrimination jurisprudence. First, the D.C.

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[18] *Compare* Sheridan v. E.I. DuPont de Nemours, 100 F.3d 1061, 1067, 1072 (3d Cir. 1996) (holding that proof of pretext is always enough for a plaintiff to survive summary judgment), *and* Rotheimer v. Investment Advisers, Inc., 85 F.3d 1328, 1336–37 (8th Cir. 1996) (finding summary judgment inappropriate where a genuine issue of fact exists over whether the defendant's explanation was pretextual and a reasonable inference of discrimination can be drawn), *with* Hidalgo v. Overseas Condodo Ins. Agencies, Inc., 120 F.3d 328, 335–37 (1st Cir. 1997) (granting the defendant's motion for summary judgment because the plaintiff offered no evidence of intentional discrimination, even though the court presumed that there was a genuine issue of material fact that the defendant's proffered reason for the action was pretext); Nidds v. Schindler Elevator Corp., 113 F.3d 912, 918 (9th Cir. 1996) (same); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996) (stating that in most instances, employment discrimination plaintiffs use circumstantial evidence to show pretext because direct evidence is rare); Fisher v. Vassar College, 114 F.3d 1332, 1335–38 (2d Cir. 1997) (en banc) (same); *and* Kline v. Tennessee Valley Authority, 128 F.3d 337 (6th Cir. 1997) (same). *See generally* Christopher H. Mills et al., *Selected Issues Regarding RIF's: Releases, Discovery, "Smoking Guns," and Statistics in Age Discrimination Challenges to Downsizing and Layoffs*, *in* AM. LAW INST-AM. BAR ASSOC. CONTINUING LEGAL EDUC., at 189, 236–38 (ALI-ABA Course of Study Materials, Mar. 12, 1998) (discussing the various opinions of the circuit courts that reflect the split over pretext and noting that each circuit has entered into the debate).

Circuit's interpretation of *Hicks* is consistent with the Supreme Court's decision as a whole, and thus diffuses the extreme positions in the pretext debate that rely on selected language in *Hicks*. Second, the D.C. Circuit's conclusion that plaintiffs can survive summary judgment by combining proof of pretext with circumstantial evidence in the prima facie case is consistent with a recent Supreme Court trend that favors an expansion of a plaintiff's opportunity to make her claim.[19] Finally, because it is rare for plaintiffs to have direct evidence of a defendant's discriminatory motives, permitting plaintiffs to rely on circumstantial evidence to survive summary judgment increases their chances of having their claims decided by a jury. Therefore, the D.C. Circuit's interpretation of *Hicks* is consistent with the purpose of anti-discrimination statutes to provide employees an opportunity to hold their employers liable for the discrimination they encounter in the workplace.

II. *McDONNELL DOUGLAS* FRAMEWORK: THE DEBATE BEGINS

Two pivotal Supreme Court decisions shaped the three-prong *McDonnell Douglas* framework that courts use to determine the disposition of an employment discrimination claim.[20] In *McDonnell Douglas Corporation v. Green*,[21] the Court established the three-prong framework. Almost ten years later, in *Texas Department of Community Affairs v. Burdine*, the Court elaborated on the distribution of the burdens of proof and production between plaintiffs and defendants under the *McDonnell Douglas* framework.[22]

In what follows, I will briefly explain how the *McDonnell Douglas*

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[19] The D.C. Circuit's interpretation of *Hicks* could be characterized as "pro-plaintiff" because it enables plaintiffs to survive summary judgment with circumstantial evidence. But this is not a negative characterization, considering most plaintiffs are not fortunate enough to have direct evidence of the defendant's discriminatory motive. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). Thus, under the D.C. Circuit's interpretation of *Hicks*, plaintiffs have an opportunity to get to trial based upon the evidence they will realistically have available to prove that they were victims of intentional discrimination. However, the D.C. Circuit's interpretation in *Aka* is surprising in light of the criticism *Hicks* has received from scholars for giving plaintiffs a burden of persuasion too high to get past summary judgment. *See generally* R. Alexander Acosta & Eric J. Von Vorys, *Bursting Bubbles and Burdens of Proof: Disagreements on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 TEX. REV. L. & POL. 207, 218 (1998); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK L. REV. 703, 722–24 (1995); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2308 (1995).

[20] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973); *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[21] 411 U.S. 792 (1973).

[22] *See Burdine*, 450 U.S. at 256.

framework was established in these two decisions, and then address why a split in the circuits over how a plaintiff survives summary judgment grew out of it.[23] Specifically, the Court's discussion of a plaintiff's burden at the pretext stage in *Burdine* failed to clarify two crucial issues: If a plaintiff does not have direct evidence, can she rely upon circumstantial evidence to discredit the defendant's proffered reason and establish an inference of discrimination? Or do courts have the discretion to require a plaintiff to present direct evidence of discrimination to survive summary judgment at the pretext stage?[24]

A. *The Prima Facie Case*

The issue before the Supreme Court in *McDonnell Douglas* was what order and allocation of proof was required in a private employment discrimination suit.[25] The plaintiff was an African-American mechanic who claimed he was denied employment because of his race.[26] In support of his claim, the plaintiff presented evidence of his job qualifications and evidence that the mechanic position remained open after the plaintiff was rejected.[27] The district court dismissed the plaintiff's race discrimination claim,[28] and the Eighth Circuit reversed.[29]

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[23] Several scholars agree that the Supreme Court's decision in *Burdine* started the debate in the circuits over how a plaintiff survives summary judgment at the pretext stage. *See* Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case*, 12 LAB. L.J. 371, 381–95 (1997) (critiquing the *McDonnell Douglas* framework, the author explains why it has generated "unproductive, conflicting, and often quite dubious legal doctrines"); *see also* Malamud, *supra* note 19, at 2317–24 (discussing the elimination of the *McDonnell Douglas* framework in favor of an open-ended standard).

[24] *See, e.g.*, Davis, *supra* note 19, at 713 (noting *Burdine* clarified the defendant's burden under the *McDonnell Douglas* framework, but "it muddled what the plaintiff must show at stage three").

[25] *See McDonnell Douglas*, 411 U.S. at 800.

[26] *See id.* at 796. The plaintiff also claimed that he was denied employment because of his involvement in the civil rights movement, which included protesting the defendant's alleged racially motivated hiring process. *See id.* at 794. Under Title VII of the 1964 Civil Rights Act, it is unlawful for an employer to discriminate against an individual because she opposed an unlawful employment action. *See* 42 U.S.C. § 2000e-3(a) (1994).

[27] *See McDonnell Douglas*, 411 U.S. at 794–96. The plaintiff's qualifications as a mechanic were demonstrated by his former employment with the defendant. *See id.* Moreover, although he was previously laid off, it was due to a general reduction in the work force and not poor performance. *See id.* at 794.

[28] *See id.* at 797 (citing Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 850 (E.D. Mo. 1970)). The district court dismissed the plaintiff's racial discrimination claim because the Equal Employment Opportunity Commission (EEOC) failed to find reasonable cause of a Title VII violation during their investigation. *See id.* The district court also dismissed the plaintiff's claim based on his civil rights activities. *See id.*

[29] *See McDonnell Douglas*, 411 U.S. at 797–98 (citing Green v. McDonnell Douglas

The Supreme Court affirmed the circuit court and set forth a framework to expedite the disposition of employment discrimination claims.[30] The Court held that the plaintiff carries the initial burden of proof to establish a prima facie case of discrimination.[31] In order to satisfy this burden, the plaintiff must show that (1) she was a member of a protected class, (2) she was rejected for a position, (3) she was qualified, and (4) the position remained open.[32] After establishing these four factors, a plaintiff establishes a prima facie case that permits a presumption of discrimination.

For example, the plaintiff in *McDonnell Douglas* was African-American, he applied for a mechanic position that he was trained for, he was rejected for the position, and the defendant continued to advertise for a mechanic.[33] Based upon the circumstantial evidence showing that the plaintiff is qualified and yet rejected for the position in question, the Supreme Court held that the trier of fact is permitted to presume that the defendant was motivated by discrimination.[34]

This inference of discrimination is predicated upon the presumption that an adverse action is based upon impermissible factors unless otherwise explained.[35] Thus, if a plaintiff is otherwise qualified for the position in question, and yet rejected for that position, it is more likely than not that the defendant was motivated by impermissible factors such as race.[36] Therefore, the Supreme Court held that upon establishing a prima facie case, the plaintiff has presented an

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Corp., 463 F.2d 337, 352 (8th Cir. 1972)). The Eighth Circuit held that an EEOC determination of reasonable cause was not a prerequisite to filing a claim in federal court. *See id.* Although the Eighth Circuit reversed on the defendant's race discrimination claim, it affirmed the dismissal of the claim based on the plaintiff's civil rights activities. *See id.*

[30] *See id.* at 798.

[31] *See id.* at 802. By establishing the four factors set forth in *McDonnell Douglas*, a plaintiff makes a prima facie case, which permits a presumption of discrimination. *See id.* at 803; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[32] *See McDonnell Douglas*, 411 U.S. at 802–03. The Supreme Court noted that the four factors create a conceptual framework, not a framework that is to be rigidly followed. *See id.* at 802 n.13. Because the facts of each case vary, the Court determined that the *McDonnell Douglas* framework must be applied flexibly. *See id.* For example, even if the position in question has not been filed, a plaintiff can still establish a prima facie case. For another example of the flexibility applied to the *McDonnell Douglas* four factors, see *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308 (1996). In *O'Connor*, a 56 year-old plaintiff in an ADEA case was replaced by a 40 year-old individual. *See id.* at 308–09. The Supreme Court held that a plaintiff is not required to prove replacement by a person not in a protected class to satisfy the fourth factor. *See id.* at 312.

[33] *See McDonnell Douglas*, 411 U.S. at 796.

[34] *See id.* at 804.

[35] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[W]e are willing to presume [the defendant was motivated by discrimination] because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.").

[36] *See id.*

actionable claim under Title VII.[37]

After the plaintiff establishes a prima facie case, the defendant has the burden to rebut the presumption of discrimination.[38] The defendant can rebut the presumption if it articulates a legitimate and nondiscriminatory reason for the adverse action.[39] For example, the defendant in *McDonnell Douglas* stated that it rejected the plaintiff because of his participation in unlawful conduct and not because of his race.[40] The Court concluded, without discussion, that this qualified as a legitimate and nondiscriminatory explanation.[41]

Although the defendant rebuts the initial presumption of discrimination, the inquiry for the trier of fact continues because the plaintiff has a "full and fair opportunity" to show that the defendant's proffered reason "was in fact pretext" for discrimination.[42] The Court explained that a plaintiff could successfully prove pretext by presenting circumstantial evidence that shows the defendant's stated reason is not the real reason. For example, the plaintiff could present evidence of how the employer treated the plaintiff before the adverse action, how the defendant treated other employees in the same protected class as the plaintiff, and evidence of the defendant's general policy on hiring minorities.[43]

The Court's examples demonstrate that plaintiffs can rely on circumstantial evidence to satisfy their burdens of proof both in the prima facie case and at the pretext stage. For example, to establish a prima facie case of discrimination, a plaintiff presents evidence of her qualifications and ultimate rejection. At the pretext stage, a plaintiff could then present circumstantial evidence of how she and her co-workers were treated by the defendant to persuade the trier of fact that the defendant's proffered reason for the adverse action was not the real reason. If the plaintiff rebuts the defendant's proffered reason with such circumstantial evidence, then no credible explanation remains for the adverse action. Thus, unless an employer's adverse action is otherwise explained, similar to the prima facie case, there is a presumption that the action was based upon impermissible factors. Therefore, under the *McDonnell Douglas* framework, a plaintiff could survive summary judgment at the pretext stage by presenting circumstantial evidence that shows the defendant's proffered reason is a pretext, which subsequently permits an inference that the real reason is discrimination.

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[37] *See McDonnell Douglas*, 411 U.S. at 802.

[38] *See id.*

[39] *See id.*

[40] *See id.* at 802–03.

[41] *See id.* ("We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire.").

[42] *See id.* at 804–05. Pretext in this context refers to a showing that the defendant's reason is false, a lie, or that its real motivation was discriminatory animus. *See* Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1288 n.3 (D.C. Cir. 1998) (discussing the definition of pretext as used by the Supreme Court in *McDonnell Douglas*).

[43] *See McDonnell Douglas*, 411 U.S. at 804–05.

B. *Source of the Debate Over the Pretext Stage*

Almost ten years after the *McDonnell Douglas* framework was established, the Supreme Court significantly elaborated on the three-prong test. In *Texas Department of Community Affairs v. Burdine*, the primary issue before the Court was whether after the plaintiff makes her prima facie case the burden of proof shifts to the defendant to persuade the trier of fact that it was motivated by nondiscriminatory reasons.[44] But in the process of setting forth the appropriate standard for a defendant's burden, the Court altered its position on how a plaintiff satisfies her burden of proof at the pretext stage.

In *Burdine*, the plaintiff sued the defendant under Title VII for termination because of her sex.[45] After the plaintiff made her prima facie case, the defendant explained that the plaintiff was not fired because of her sex, but because her department was inefficient.[46] The defendant saw as part of the problem an alleged friction between the plaintiff and her co-workers, and thus fired three employees—including the plaintiff—to make the department more productive.[47] The district court found that the defendant's explanation sufficiently rebutted the plaintiff's prima facie case and dismissed her claim.[48] However, the Fifth Circuit reversed, holding that the defendant's explanation did not satisfy the burden of persuasion because it did not prove that the men hired were better qualified than the plaintiff.[49]

The Supreme Court reversed, holding that the Fifth Circuit failed to apply the correct standard for a defendant's burden.[50] In *McDonnell Douglas*, the Court held that once the plaintiff satisfies her initial burden of establishing a prima facie case, the burden shifts to the defendant to articulate a nondiscriminatory reason for the action.[51] The Court in *Burdine* clarified what this burden-shifting entails

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[44] *See* Texas Dep't Community Affairs v. Burdine, 450 U.S. 248, 250 (1981).

[45] *See id.* at 251. The plaintiff claimed that after the defendant restructured the workforce, it terminated several employees while subsequently hiring a male supervisor and retaining a male employee. *See id.* During this process, the plaintiff was one of the employees who was terminated. *See id.*

In addition to her termination claim, the plaintiff also alleged that the defendant failed to promote her based on sex. *See id.* However, the district court dismissed this claim based on testimony that the plaintiff received a nondiscriminatory performance evaluation. *See id.* The Fifth Circuit affirmed that the plaintiff's failure to be promoted was not based on discrimination, because the evidence showed that the male employee who was promoted was better qualified. *See id.*

[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *See id.* at 251–52.

[50] *See id.* at 252 (remanding the case for an "application of the correct standard").

[51] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (holding that once the plaintiff makes a prima facie case, "[t]he burden then must shift to the employer to articulate

by stating that the defendant only has the burden of production.[52] That is, the defendant need only present enough evidence that sufficiently articulates a legitimate and nondiscriminatory reason for the adverse action.[53] Therefore, the Court concluded that when the defendant puts forth an explanation, it need not persuade the trier of fact that the proffered reason truly motivated the defendant to act.[54]

The Court explained that the defendant only has the burden of production because the plaintiff retains the burden of persuasion at all times under the *McDonnell Douglas* framework.[55] In an employment discrimination case, the ultimate question for the trier of fact is whether the plaintiff is a victim of intentional discrimination. The three-prong framework places the burden of proving discrimination on the plaintiff: if the defendant rebuts the initial presumption of discrimination, then the plaintiff has the opportunity to prove that the defendant's reasons were a pretext for discrimination.[56] Otherwise, if the defendant were required to persuade the trier of fact that the proffered reasons were true, it would be placing upon the defendant the plaintiff's ultimate burden of proving she was a victim of discrimination by requiring the defendant to prove

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the plaintiff makes a prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection").

[52] *See Burdine*, 450 U.S. at 254–55 (holding that "[t]he burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason").

[53] *See id.*; *see also* Davis, *supra* note 19, at 713. Davis noted that the *Burdine* decision could be criticized for placing only a small burden on the defendant while placing the lofty burden of persuasion solely on the plaintiff. *See id.* But as Davis points out, the Supreme Court addressed this criticism by holding that the legitimate reason must be clear and specific. *See id.* (citing *Burdine*, 450 U.S. at 258). Moreover, even without the burden of persuasion, the defendant will want to persuade the trier of fact as a tactical matter that the explanation is bona fide. *See id.*

[54] *See Burdine*, 450 U.S. at 254 (holding that the burden of persuading the trier of fact that the defendant acted out of intentional discrimination remains with the plaintiff) (citing Bd. of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978)).

[55] *See Burdine*, 450 U.S. at 253.

[56] *See id.* ("[S]hould the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.") (citing *McDonnell Douglas*, 411 U.S. at 804); *see also* Davis, *supra* note 19, at 713 (discussing how the plaintiff proves pretext once the defendant proffers a nondiscriminatory reason for the adverse action).

The result of distributing the burdens between the plaintiff and defendant was that the *McDonald Douglas* framework defined two situations in which the defendant could prevail on summary judgment. The first occurs when the plaintiff fails to establish her prima facie case of discrimination. Alternatively, the defendant is entitled to summary judgment if the plaintiff does not show that the defendant's proffered reason for the adverse action was a pretext for discrimination. *See Burdine*, 450 U.S. at 252–53.

she was not discriminated against.[57] Therefore, the Supreme Court concluded that under the *McDonnell Douglas* framework, the burden placed upon the defendant is only the burden of production.[58]

The Supreme Court's discussion of the plaintiff's ultimate burden of persuasion significantly altered how a plaintiff satisfies her burden of proof at the pretext stage. The Court in *McDonnell Douglas* held that after the defendant proffers an explanation, the plaintiff has the opportunity to show that the defendant's proffered reasons "were in fact a cover-up" for discrimination.[59] Moreover, the Court demonstrated how a plaintiff could satisfy her burden with circumstantial evidence, thereby suggesting that a plaintiff without direct evidence could satisfy her burden by presenting sufficient circumstantial evidence to permit an inference of discrimination.[60] However, in *Burdine*, the Court stated that the plaintiff's burden of proving pretext merges with her ultimate burden of persuading the trier of fact that she was a victim of intentional discrimination.[61] By discussing proof of pretext and proof of discrimination as separate burdens that merge together at the pretext stage, the Court suggested that a plaintiff must perform two definitive duties to satisfy her burden of persuasion. That is, she must show that the defendant's proffered reason was false and that discrimination was the real reason for the adverse action.[62]

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[57] In essence, the *Burdine* Court narrowed the focus of employment discrimination litigation to what the defendant shows. Once a defendant rebuts the presumption of discrimination, the Court held that the factual issues in the case are clarified to give the plaintiff the opportunity to prove pretext. *See Burdine*, 450 U.S. at 256. But clarification in this context means that the plaintiff's prima facie case has no more weight, and she must persuade the trier of fact that she was the victim of intentional discrimination with new evidence. However, *Burdine* left open the possibility that the plaintiff's burden of persuasion could be satisfied with either direct evidence of discrimination or with circumstantial evidence that shows the defendant's explanation was pretextual. *See id.* Thereby, a showing of pretext would permit an inference of discrimination. The Supreme Court later affirmed this narrowed focus when it stated that after a defendant sets forth an explanation, the presumption of discrimination "simply drops out of the picture." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993). For further discussion, see *infra* text accompanying notes 83–86.

[58] *See Burdine*, 450 U.S. at 254–56. As the Supreme Court explained, if a defendant is successful in rebutting the presumption of discrimination from the prima facie case, the burden of proof remains on the plaintiff to establish intentional discrimination. *See id.* at 255 n.10. But if the defendant's rebuttal is unsuccessful, it results in a judgment for the plaintiff. *See id.* at 254. Therefore, although plaintiffs have the ultimate burden of persuasion, the assumption from the Court is that defendants will voluntarily attempt to persuade the trier of fact that they did not intentionally discriminate against the plaintiffs.

[59] *See McDonnell Douglas*, 411 U.S. at 805.

[60] *See supra* text accompanying notes 42–43.

[61] *See Burdine*, 450 U.S. at 256.

[62] *See id.* Under this interpretation, the plaintiff's burden of proof at the pretext stage could be referred to as a "double duty." That is, in order to satisfy her burden of proof at the pretext stage, the plaintiff has two duties to perform: she must show that the defendant's proffered

However, what the *Burdine* Court failed to make clear is the kind of evidence a plaintiff can use to satisfy this dual burden. The Court suggested that a plaintiff could still satisfy her burden of proof at the pretext stage with circumstantial evidence, stating that the plaintiff could present "indirect evidence"which discredits the defendant's explanation and then citing the *McDonnell Douglas* examples for support.[63] However, the Court also stated that a plaintiff could present direct evidence of a defendant's discriminatory motive to satisfy her burden of persuasion.[64] Thus, perhaps the real problem with *Burdine* is that the Court failed to resolve ultimately who made the decision. Specifically, did plaintiffs without direct evidence maintain the discretion to present sufficient circumstantial evidence to discredit the defendant's reason and permit an inference of discrimination? Or did courts have the discretion to require that, in addition to proving pretext, a plaintiff must also present direct evidence of a discriminatory motive to satisfy her burden of persuasion?

The Supreme Court simply failed to address these questions in *Burdine*. Thus, by default, it left the discretion to the lower courts to decide whether a plaintiff is permitted to rely on circumstantial evidence or is required to present direct evidence of discrimination at the pretext stage. Therefore, in the post-*Burdine* era, plaintiffs could not be assured that they would survive summary judgment without direct evidence since the kind of evidence permitted, or required, depended on which court was reviewing their case.

C. *The Post-*Burdine *Debate over the Pretext Stage*

The Supreme Court's silence in *Burdine* over who decides the kind of evidence a plaintiff can present to satisfy her burden of proof at the pretext stage created a split in the circuit courts. At issue is how a plaintiff can survive summary judgment at the pretext stage. Is she permitted to present circumstantial evidence to satisfy her burden of proof? Or can a court require her to present direct evidence of discrimination? As I will address in this section, three approaches to the pretext stage emerged: "pretext-plus," "pretext-always," and "permissive pretext."

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reason is false and prove that the real reason is discrimination. Thus, only if a plaintiff satisfies her double duty will she survive summary judgment at the pretext stage.

[63] *See id.* at 256 (stating the plaintiff could succeed at the pretext stage by "indirectly . . . showing that the employer's proffered explanation is unworthy of credence") (citing *McDonnell Douglas*, 411 U.S. at 804–05).

[64] *See Burdine*, 450 U.S. at 256 (stating that the plaintiff could also succeed at the pretext stage by "directly . . . persuading the court that a discriminatory reason more likely motivated the employer").

1. *"Pretext-Plus"*

Some courts interpreted *Burdine* as requiring the plaintiff to prove two separate burdens to survive summary judgment.[65] A plaintiff must show that the defendant's proffered reason is not the true reason.[66] However, this burden merges with the ultimate burden of proving directly that she was the victim of intentional discrimination.[67] Thus, a plaintiff must discredit the defendant's explanation and then present direct evidence of discrimination to prove that the defendant was motivated by discriminatory animus. This is a "pretext-plus" position: to survive summary judgment, a plaintiff must prove pretext plus present additional, or direct, evidence to prove that the real reason was discrimination.[68]

2. *"Pretext-Always"*

Other courts interpreted *Burdine* as giving plaintiffs two options to prove that the defendant's reason is false and that the real reason is discrimination. A plaintiff can present direct evidence of the defendant's discriminatory motive, which will simultaneously show that the proffered reason is false and that discrimination is the real reason.[69] Alternatively, a plaintiff can present indirect evidence that persuades the trier of fact to disbelieve the defendant's explanation

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[65] *See* Davis, *supra* note 19, at 714 & n.58 (discussing the pretext-plus approach and noting the circuit courts that followed this position); *see, e.g.*, Smith, *supra* note 23, at 391–92 (noting that *Burdine* became a source of confusion in the circuit courts, causing some to define "pretext" as "pretext for discrimination" and therefore requiring a plaintiff to show more than that the defendant was lying, but proving intentional discrimination); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 759–62 (1987) (explaining why the "pretext-plus" position is not constitutionally mandated).

[66] *See Burdine*, 450 U.S. at 256 (stating the plaintiff "now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision").

[67] *See id.* (holding that the burden of proving pretext "now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination").

[68] *See, e.g.*, EEOC v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992) (holding a finding of pretext does not compel a finding of discrimination); Galbraith v. Northern Telecom, Inc., 944 F.2d 275, 283 (6th Cir. 1991) ("[P]roving that an employer's proffered reason for discharging an employee is a pretext does not establish that it is a pretext for racial discrimination."); Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2d Cir. 1991) (holding a plaintiff must show that the defendant's explanation was false to satisfy her burden of proof at the pretext stage); Holder v. City of Raleigh, 867 F.2d 823, 827 (4th Cir. 1989) (noting a finding that the defendant's reasons were pretextual does not prove racial discrimination); Clark v. Huntsville Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983) (explaining that even if a plaintiff shows the defendant's explanation was pretextual, there must be a finding that the defendant was motivated by discrimination).

[69] *See Burdine*, 450 U.S. at 256.

and permit an inference of discrimination.[70] Thus, if a plaintiff chooses the second option, after proving pretext she need not present any additional evidence of discrimination. This is a "pretext-always" position: once a plaintiff persuades the trier of fact that the defendant's explanation is false, she has satisfied her burden of proof.[71] The assumption is that circumstantial evidence of pretext is enough to create an inference of discrimination at the pretext stage.[72] Therefore, by proving that the defendant's explanation is "unworthy of credence," the plaintiff shows both that the defendant's reason is false and that discrimination is the real reason.

3. *"Permissive Pretext"*

In between "pretext-plus" and "pretext-always" were those courts that interpreted *Burdine* as granting lower courts the discretion to decide whether a plaintiff could satisfy her burden at the pretext stage with just circumstantial evidence of pretext.[73] At the pretext stage, a plaintiff's burden of showing the defendant's explanation is unbelievable merges with her burden of proving she was a victim of intentional discrimination.[74] Under *Burdine*, a plaintiff can prove this either with direct evidence of a discriminatory motive or with circumstantial evidence of pretext.[75] If a plaintiff proves pretext with circumstantial evidence, it is the lower court's decision to permit an inference of discrimination or require additional evidence of discrimination. This is a "permissive pretext" position: once a plaintiff shows that the defendant's proffered reason is pretextual, the trier of fact may, but is not compelled to, find that the plaintiff has satisfied her burden of persuasion.[76]

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[70] *See id.* (stating that instead of satisfying her burden with direct evidence, a plaintiff could "indirectly... show[ ] that the employer's proffered explanation is unworthy of credence").

[71] *See, e.g.*, Caban-Wheeler v. Elsea, 904 F.2d 1549, 1554 (11th Cir. 1990) (citing *Burdine*, 450 U.S. at 256); Tye v. Bd. of Educ., 811 F.2d 315, 319 (6th Cir. 1987) (citing *Burdine*, 450 U.S. at 256); King v. Palmer, 778 F.2d 878, 879 (D.C. Cir. 1985); Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 646 (5th Cir. 1985); Bibbs v. Block, 778 F.2d 1318, 1321 (8th Cir. 1985); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir. 1984).

[72] *See* Davis, *supra* note 19, at 716. Calling the pretext always approach "pretext only," Davis explains the approach and cites those circuits that followed it. *See id. See also* Robert Brookins, Hicks, *Lies, and Ideology: The Wages of Sin is Now Exculpation*, 28 CREIGHTON L. REV. 939, 989 (1995).

[73] *See generally* Robert C. Cadle, *Burdens of Proof: Presumption and Pretext in Disparate Treatment Employment Discrimination Cases*, 78 MASS. L. REV. 122, 131 (1993); Richard A. Samp, *Intent Is Needed for Workplace Bias*, NAT'L L.J., June 14, 1993, at 15.

[74] *See Burdine*, 450 U.S. at 256.

[75] *See id.*

[76] *See, e.g.*, Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991); Benzies v. Illinois Dep't of Mental Health and Developmental Disabilities, 810 F.2d 146, 148 (7th Cir.

III. *ST. MARY'S HONOR CENTER V. HICKS*: THE SPLIT IN THE CIRCUITS WIDENS

In the section that follows, I will argue that the Supreme Court in *St. Mary's Honor Center v. Hicks* failed in part to resolve the post-*Burdine* split in the circuits[77] over how a plaintiff survives summary judgment at the pretext stage. The Supreme Court partially resolved the split by holding that, in certain situations, a plaintiff can survive summary judgment without direct evidence, by combining proof of pretext with the circumstantial evidence presented in the prima facie case.[78] However, the Supreme Court did not fully resolve the split because it failed to define when such a situation exists. Thus, similar to the post-*Burdine* era, the lower courts after *Hicks* have the discretion to permit circumstantial evidence or require the plaintiff to present direct evidence of discrimination to satisfy her burden of proof at the pretext stage. As a result, although the Court had the opportunity to resolve the split,[79] *Hicks* left the door open for more debate over how a plaintiff survives summary judgment at the pretext stage.

A. *History of* Hicks

In a claim of race discrimination under Title VII, the United States District Court for the Eastern District of Missouri entered judgment against the plaintiff Melvin Hicks.[80] Although the court conceded that Hicks had shown the defendant's explanation was false, it held that he did not prove that the defendant's actions were racially motivated.[81] The Eighth Circuit reversed and

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1987).

[77] *See supra* text accompanying notes 65–76. *Burdine*'s conclusion, that a plaintiff could present either direct or indirect evidence to satisfy her burden of persuasion at the pretext stage, left several questions unanswered. Did a plaintiff or a court have the discretion to decide whether a plaintiff could rely on circumstantial evidence to satisfy her burden of proof? Is proof of pretext enough to persuade the trier of fact that the defendant was motivated by discrimination? *See supra* text accompanying notes 69–72 (discussing the "pretext-always" position). Or were plaintiffs required to present direct evidence of discrimination, in addition to proof of pretext, to satisfy their burdens of persuasion at the pretext stage? *See supra* text accompanying notes 65–68 (discussing the "pretext-plus" position).

[78] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

[79] *See id.* at 512 (stating the circuit courts' "divergent views concerning the nature of the [*McDonnell Douglas* framework] are precisely what prompted us to take this case."); *see, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (stating that the *McDonnell Douglas* framework is a "sensible, orderly way to evaluate the evidence," which gives both defendants and plaintiffs the opportunities to litigate the employment discrimination claim).

[80] *See* Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1252 (E.D. Mo. 1991).

[81] *See id.* at 1252 (holding that although the petitioner had "proven the existence of a crusade to terminate him, he [had] not proven that the crusade was racially rather than

remanded on the grounds that once a plaintiff proves that the defendant's proffered reason is pretextual, no additional proof is required and the plaintiff is entitled to judgment as a matter of law.[82]

The Supreme Court reversed and criticized the Eighth Circuit for ignoring the plaintiff's continuous burden of persuading the trier of fact that the defendant was motivated by discriminatory animus.[83] The Supreme Court was concerned that if a plaintiff only had to show that the defendant's explanation was pretextual, a defendant could be held liable under Title VII without proof of intentional discrimination.[84] Proof that the defendant lied is not equal to proof that the

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personally motivated").

[82] *See* Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992) (stating that "[b]ecause all of defendants' proffered reasons were discredited . . . defendants were in no better position than if they had remained silent.").

[83] *See Hicks*, 509 U.S. at 511. The Court reminded the lower court that the *McDonnell Douglas* framework only shifts the burden of production to the defendant. *See id.* Once the defendant fulfills this burden by giving a legitimate explanation, the presumption of discrimination drops from the case and the plaintiff maintains the burden of persuading the trier of fact that she is a victim of discrimination. *See id.* at 510–11. Therefore, the Court rejected the Eighth Circuit's holding that proof of pretext compels judgment for plaintiffs because it ignores the plaintiff's "ultimate burden of persuasion" under Title VII. *See id.* at 511. *But see* sources cited *supra* note 19 (criticizing the Court's decision in *Hicks*).

[84] *See Hicks*, 509 U.S. at 511–15. The Supreme Court explained that proof of pretext merely showed that the defendant lied or was unbelievable when it proffered its nondiscriminatory reason. *See id.* at 514. Moreover, the Court stated it has no authority to impose liability upon the defendant for discriminatory practices unless it is proven the defendant did in fact intentionally discriminate against the plaintiff. *See id.* Thus, to prevail in judgment, a plaintiff must present evidence that will lead to a finding of discrimination.

Another important issue in *Hicks* is the type of explanation a defendant can offer to rebut a presumption of discrimination. In *Hicks*, the district court granted summary judgment in favor of the defendant. *See Hicks*, 756 F. Supp. at 1253. It held that although the plaintiff had shown the defendant's proffered reason was pretextual, he failed to show it was a pretext for discrimination as opposed to personal animus. *See id.* at 1252. However, personal animus was not the explanation proffered by the defendant. Rather, the district court based its decision on facts in the record that could support an explanation like personal animus. The Eighth Circuit reversed the district court's decision because it held proof of pretext entitles a plaintiff to judgment as a matter of law. *See Hicks*, 970 F.2d at 492. The Court reasoned that when a defendant's explanation is discredited, it is in the same position it would have been in if it had never offered a legitimate reason to rebut the inference of discrimination. *See id.*

The Supreme Court reversed the Eighth Circuit's decision and recognized personal animus as a legitimate and nondiscriminatory reason for a defendant's actions. *See Hicks*, 509 U.S. at 520–24. More importantly, the Court recognized the trial court's duty to look beyond the explanation proffered by the defendant to see if a nondiscriminatory reason exists in the record. *See id.* The Court asserted that regardless of the reason the defendant chooses to "articulate" as its explanation, other legitimate reasons have been articulated in the record "through the introduction of admissible evidence." *Id.* at 522–23 (citing *Burdine*, 450 U.S. at 255). Because the defendant sets forth reasons "through the introduction of admissible evidence," then several legitimate reasons could be found "lurking in the record." *Id.* Thus, a plaintiff need not address

defendant discriminated against the plaintiff.[85] Thus, the Court held in *Hicks* that a plaintiff must show additional evidence of discrimination to ultimately prevail.[86]

Although a plaintiff could not prevail by proving pretext, the Supreme Court did not reject the use of pretext to help a plaintiff survive summary judgment. It stated that "[t]he fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."[87] The prima facie case is built upon circumstantial evidence showing the plaintiff to be qualified and yet rejected for the position.[88] This establishes an inference of discrimination based on the presumption that, without an explanation to the contrary, the defendant was motivated by impermissible factors.[89] Thus, the language in *Hicks* suggests that the same logic from the prima facie case can be applied at the pretext stage. To satisfy her burden of proof, the plaintiff must show that the defendant's proffered reason is false and discrimination is the real reason. If the plaintiff discredits the defendant's reason, it rebuts the explanation, and evidence presented in the prima facie case is the only credible evidence in the record. Therefore, under *Hicks*, a plaintiff can combine proof of pretext with the circumstantial evidence in the record to establish an inference of discrimination that will satisfy the plaintiff's burden of proof at the pretext stage.

The Court's conclusion that proof of pretext can help establish an inference of discrimination gives proof of pretext considerable evidentiary weight in certain

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any unrelated reasons for the defendant's actions, but only address those reasons "lurking in the record." *Id.*

The Court also rejected the Eighth Circuit's conclusion that proof of pretext puts defendants in no better position than if it had given no reason at all. *See id.* at 509. The Court stated that by meeting its burden of production, the defendant is in a better position than before its rebuttal. *See id.* Moreover, the Court noted that when a defendant meets its burden of production and thereby rebuts a presumption of discrimination, it "precedes the credibility assessment stage." *Id.* Thus, when the trier of fact looks to the defendant and the evidence in the record for a nondiscriminatory reason, the trier of fact is not assessing the defendant's credibility. Rather, the trier of fact merely determines whether the articulated reasons are legitimate and leaves an assessment of the defendant's credibility for later. *See id.* at 509–10.

[85] *See id.* at 511–15.

[86] *See id.* at 518–20. This is not a surprising conclusion. Remember that at the pretext stage, the plaintiff is attempting to satisfy her burden of proof to get to trial. At this point, she has only made a presumption of discrimination. If a defendant proffers a nondiscriminatory reason, that presumption drops. Thus, at the pretext stage, the plaintiff must make at least an equal showing of discrimination that was made in the prima facie case. By only proving pretext, the plaintiff has shown that the defendant lied, but not whether he lied to cover-up discrimination or simply personal dislike.

[87] *Id.* at 511.

[88] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[89] *See id.*

situations.[90] For example, a defendant explains that the plaintiff was fired because she did not get along with customers, and her supervisor received complaints about her performance. The plaintiff presents evidence of customer praise, strong performance evaluations, and testifies that she has never seen or heard of any negative comments.[91] This evidence persuades the trier of fact that the defendant's explanation is unbelievable and thus rebuts the defendant's nondiscriminatory reasons.[92] Once the reasons are rebutted, the only other credible evidence before the trier of fact is from the prima facie case, which shows the plaintiff to be qualified and yet terminated from her position. Because we generally believe employers make decisions for a reason,[93] without evidence to the contrary, the trier of fact is permitted to draw an inference that the defendant was motivated by discriminatory factors.[94]

However, *Hicks* does not foreclose the use of direct evidence to satisfy the plaintiff's burden of persuasion. On the contrary, the word "may" in the decision suggests that a plaintiff cannot always satisfy her burden at the pretext stage by combining proof of pretext and evidence from the prima facie case.[95] For example, the plaintiff could present evidence showing that the real reason for the defendant's action was personal animus towards the plaintiff. Although this shows the defendant's reason was a pretext, it does not combine with the

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[90] The Court noted that the Eighth Circuit was correct to find that once an inference of discrimination was made, no additional proof was required. *See id.* But the Supreme Court instructed the lower court that this inference could only be used to survive summary judgment at the pretext stage. *See id.* Moreover, the inference is only permitted if it is made from both evidence in the prima facie case and evidence discrediting the defendant's explanation. *See id.* This supports the Court's conclusion that proof of pretext has evidentiary weight when the plaintiff uses circumstantial evidence to survive the pretext stage, but it has no weight in winning a plaintiff final judgment on her intentional discrimination claim before trial. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518–19 (noting a finding of intentional discrimination is not equal to finding the defendant's explanation untrue).

[91] *See McDonnell Douglas*, 411 U.S. at 804–05; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

[92] Here the situation would be reversed. If a plaintiff were relying on circumstantial evidence—evidence used to make her prima facie case—then proof of pretext would need to be strong enough to sustain that original finding of discrimination. For example, once a defendant rebuts the presumption of discrimination with a nondiscriminatory reason, the prima facie case is dropped. If the plaintiff is to succeed in surviving the pretext stage by relying on evidence from that prima facie case, proof of pretext must be strong enough to sustain that original finding. In this context, proof of pretext does more than support a finding of discrimination; it is crucial to making such a finding.

[93] *See supra* notes 35–36 and accompanying text.

[94] For a discussion of why the trier of fact is permitted to make an inference of discrimination, see *supra* notes 30–36 and accompanying text.

[95] The word "may" also affirms the Court's decision in *Burdine* that a plaintiff can rely on direct evidence of the defendant's discriminatory motive to persuade the trier of fact that the plaintiff is a victim of intentional discrimination. *See Burdine*, 450 U.S. at 256.

evidence in the prima facie case to permit an inference that the defendant's proffered reason was a "cover-up" for discrimination.[96] Thus, in this situation the plaintiff would need to present additional, or direct, evidence of discrimination to satisfy her burden of proof and survive summary judgment.[97]

The *Hicks* decision has two significant effects on employment discrimination jurisprudence. First, the Court ensures that a plaintiff does not survive the pretext stage without proving that the defendant was motivated by discrimination.[98] If a plaintiff presents circumstantial evidence, she must show that the defendant's explanation is unbelievable and then adequately combine this proof of pretext with evidence from the prima facie case to create an inference of discrimination.[99] Alternatively, if the plaintiff presents direct evidence of the defendant's discriminatory motive, this alone will show that the defendant's explanation was false and that the real reason was discrimination.

The second effect is that *Hicks* ensures plaintiffs a more "full and fair opportunity"[100] to satisfy their burden of proof at the pretext stage. It is rare for employment discrimination plaintiffs to have direct evidence of a defendant's discriminatory motive.[101] Thus, if a plaintiff were required to present direct evidence to satisfy her burden of proof at the pretext stage, a majority of plaintiffs would not survive summary judgment. Therefore, by holding that in certain situations plaintiffs may rely on circumstantial evidence to persuade the trier of fact that they were more than likely the victims of intentional discrimination, the Supreme Court ensured plaintiffs a better chance of having their claims decided by a jury.[102]

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[96] *See, e.g., McDonnell Douglas*, 411 U.S. at 805 (stating plaintiffs must have the opportunity to demonstrate "by competent evidence" that the defendant's proffered reasons "were in fact a cover-up for" discrimination).

[97] It would be difficult for a court not to find an employer's discriminatory statements about a plaintiff an indication that the employer's real reason for not hiring the plaintiff was a discriminatory motive. Therefore, direct evidence will often stand alone to persuade the trier of fact that the plaintiff was a victim of intentional discrimination. In this context, proof of pretext would help support the finding of discrimination, but it would not be crucial to make such a finding. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

[98] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1992) (explaining that rejection of the proffered reasons of the defendant does not compel judgment for the plaintiff).

[99] *See id.* at 517.

[100] *See McDonnell Douglas*, 411 U.S. at 805 (stating the plaintiff must have "a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for [her] rejection were in fact a cover-up for a . . . discriminatory decision").

[101] *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716–17 (1983) (noting that direct evidence in employment discrimination cases is rare because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"); *see also* Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996) (explaining that direct evidence is rare in a discrimination case).

[102] Under the 1991 Civil Rights Act, employment discrimination plaintiffs received the

1. *Confusion from* Hicks

Although the Supreme Court held that plaintiffs could satisfy their burdens of proof with circumstantial evidence, the Court failed to define when it was appropriate for a plaintiff to do so. The only guidance from the Court was that a rejection of the defendant's explanation can "sustain a finding of discrimination," but "there [still] must be a finding of discrimination."[103] This statement is not surprising considering the Court's concern[104] that a defendant not be held liable unless it is determined that the defendant unlawfully discriminated against the plaintiff.[105] Thus, it seems only to reiterate that a plaintiff's burden at the pretext stage is two-fold: show that the defendant's reason is false and show that discrimination was the real reason.

But the Court's statement does not define when it is appropriate for plaintiffs to rely on an inference of discrimination and thus only raises more questions in the debate over how a plaintiff survives summary judgment at the pretext stage. For example, what qualifies as a "finding of discrimination" in the context of satisfying a plaintiff's burden of proof? A "finding" generally refers to a determination of fact based upon the evidence presented.[106] This could suggest that, in terms of satisfying the plaintiff's burden of proof, it is more appropriate for the trier of fact to make a finding of discrimination based upon direct evidence of discrimination.[107] However, *Hicks* also states that proof of pretext combined with evidence in the prima facie case may be sufficient to show intentional discrimination.[108] The prima facie case establishes an inference of discrimination

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right to a jury trial. *See* 42 U.S.C. § 1981a(c)(1) (1994). The purpose of the 1991 Act was to ensure that the Supreme Court followed Congress's lead and provided individuals "appropriate remedies" for discrimination. *See* 42 U.S.C. § 1981(c).

[103] *Hicks*, 509 U.S. at 512 n.4.

[104] *See id.* at 514–25. The Supreme Court explained its reluctance to find a defendant employed discriminatory practices without evidence of discrimination. *See id.* It stated that showing a defendant's explanation is false is different from showing that the defendant was motivated by discrimination. *See id.* Therefore, although circumstantial evidence may permit an inference of discrimination, the evidence must not only show that the defendant was unbelievable, but also that discrimination was the real reason for the adverse action. *See id.*

[105] *See id.*

[106] *See* BLACK'S LAW DICTIONARY 632 (6th ed. 1990).

[107] But the Supreme Court stated proof of pretext "sustain[s] a finding of discrimination." *Hicks*, 509 U.S. at 511 n.4. Thus the logic of this interpretation immediately brings one question to mind: "sustain" a finding from what? If a plaintiff has direct evidence of discrimination, then the plaintiff certainly has satisfied her burden of persuasion, and the case goes to a jury to decide. Therefore, if a plaintiff has additional evidence outside of her prima facie case, then proof of pretext is not necessary.

[108] *See id.* at 511 ("The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination.").

based upon evidence of the plaintiff's qualifications and rejection.[109] Thus, in the context of needing a "finding of discrimination" to satisfy the plaintiff's burden of proof at the pretext stage, an inference of discrimination also appears to qualify as a "finding" under *Hicks*.

Although an inference of discrimination may be an appropriate finding to satisfy a plaintiff's burden of proof, the *Hicks* decision still leads to another important question: who decides when this inference is appropriate? Specifically, if a plaintiff does not have direct evidence, does *Hicks* automatically permit her to rely on circumstantial evidence if it establishes a strong inference of discrimination? Or does a court have the discretion to decide when a plaintiff can rely on circumstantial evidence and when she is required to present direct evidence of discrimination?

One would assume that a lower court is precluded from presumptively requiring a plaintiff to present direct evidence because *Hicks* states that a plaintiff can combine proof of pretext with the prima facie case to show intentional discrimination.[110] But without more from the Court than simply stating that there needs to be a "finding of discrimination," lower courts can decide at their own discretion when an inference of discrimination is and is not an appropriate finding to satisfy the plaintiff's burden at the pretext stage.[111] Thus, although *Hicks* gave plaintiffs the opportunity to survive summary judgment without direct evidence, the Supreme Court failed to ensure that the circuit courts would consistently provide that opportunity. As such, *Hicks* left the door open for more debate over how a plaintiff survives summary at the pretext stage.

IV. *AKA V. WASHINGTON HOSPITAL CENTER* INTERPRETS *HICKS*

The D.C. Circuit is the latest court to address the debate over how a plaintiff survives summary judgment in the post-*Hicks* era. In what follows, I will argue that in *Aka v. Washington Hospital Center*, the D.C. Circuit correctly interpreted

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[109] *See supra* notes 30–36 and accompanying text.

[110] *See id.*

[111] For example, consider again the scenario in which the defendant explains that the plaintiff was terminated due to poor performance, and the plaintiff rebuts the explanation with evidence of customer praise and good performance review. Presumably, under *Hicks*, the plaintiff will satisfy her burden of proof at the pretext stage if her evidence shows that the defendant's reason is unbelievable and rebuts the defendant's legitimate explanation. Combined with the evidence in the prima facie case showing the plaintiff to be qualified and yet rejected, unless other evidence to the contrary, the trier of fact is permitted to make an inference of discrimination. However, without more guidance from the Court, a lower court could decide in its discretion that the plaintiff is still required to present direct evidence of discrimination to survive summary judgment. Because *Hicks* does not mandate when an inference of discrimination is an appropriate finding of discrimination to satisfy the plaintiff's burden of proof, lower courts can always decide that a finding of discrimination based on direct evidence is always the more appropriate finding at the pretext stage.

Hicks as securing a plaintiff's opportunity to survive summary judgment without direct evidence, regardless of the court. First, I will briefly layout the facts in *Aka* to provide a context for the discussion over summary judgment at the pretext stage. Next, I will explain how the D.C. Circuit developed an analysis centered on issues of credibility to determine whether a plaintiff can rely upon circumstantial evidence to satisfy her burden of proof at the pretext stage. After explaining the *Hicks* analysis, I will demonstrate how it was applied to the facts in *Aka*. I will conclude by comparing the *Aka* analysis to a similar circuit court decision to demonstrate why the D.C. Circuit got it right when it came to addressing the debate over the pretext stage in the post-*Hicks* era.

A. *Facts*

Etim U. Aka (Aka), a fifty-six year-old man from Nigeria,[112] worked as an orderly for the Washington Hospital Center (WHC) for over nineteen years.[113] His duties included transporting patients and medical supplies to and from operating rooms, and he frequently picked up medications from the hospital pharmacy.[114] Aka wanted to move up the ranks at WHC, and thus earned a bachelor's degree and a master's degree in business and public administration in health service management to improve his chances.[115]

In 1991, Aka underwent heart bypass surgery and was in rehabilitation for several months.[116] He was told by his doctor only to engage in moderate levels of exertion when he returned to work in 1992.[117] Because the orderly position required large amounts of heavy lifting and pushing, Aka asked WHC for a transfer.[118] However, WHC denied Aka's request and told him he would have to seek vacant jobs with WHC on his own.[119]

Aka applied and interviewed for several positions at WHC, but was rejected each time.[120] One of the positions Aka applied for was the Central Pharmacy Technician.[121] Although Aka had two degrees and nineteen years of experience at WHC, including working with the pharmacy, he was rejected for the position.[122] The person hired for the position had worked in WHC's laundry room for less

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112 *See id.* at 1286.

113 *See id.*

114 *See id.* at 1286, 1296.

115 *See id.*

116 *See id.*

117 *See id.*

118 *See id.*

119 *See id.*

120 *See id.* at 1287.

121 *See id.*

122 *See id.*

than two years, and his only experience with the pharmacy was two months of volunteering.[123] WHC explained that it rejected Aka for the technician position because the hired applicant had more pharmacy experience, knowledge of medical terminology, and greater enthusiasm for the position.[124]

Aka filed suit against WHC under the Age Discrimination in Employment Act (ADEA) in the United States District Court for the District of Columbia.[125] At issue was whether Aka could present circumstantial evidence to satisfy his burden of proof at the pretext stage.[126] The district court granted WHC's motion for summary judgment with regard to all of Aka's claims.[127] On the first appeal to the D.C. Circuit, the district court's decision was vacated and remanded.[128] The D.C. Circuit held that Aka presented enough evidence to show WHC's explanation for the hiring decision was pretextual, and thus summary judgment was inappropriate.[129] WHC moved for a rehearing en banc, and in a second opinion, the D.C. Circuit again vacated the original grant of summary judgment.[130]

B. Aka Interprets *Hicks*

The issue before the D.C. Circuit was whether the plaintiff could survive summary judgment at the pretext stage of the *McDonnell Douglas* framework when he only had circumstantial evidence.[131] To resolve this issue, the D.C.

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[123] *See id.* at 1295–96.

[124] *See id.* at 1296.

[125] *See* Aka v. Washington Hosp. Ctr., No. 94-1281, 1996 WL 430526, at *1 (D. D.C. Mar. 29, 1996).

[126] *See id.* at *4 (explaining that a plaintiff must point to genuine issues of material fact in order to overcome summary judgment).

[127] *See id.* at *1.

[128] *See* Aka v. Washington Hosp. Ctr., 116 F.3d 876, 897 (D.C. Cir. 1997) (en banc).

[129] *See id.* at 889.

[130] The D.C. Circuit originally vacated the district court's grant of summary judgment to the defendant because it found Aka had presented enough evidence to discredit the defendant's proffered reason. *See id.* It held that under *Hicks*, if a trier of fact was presented with evidence that was sufficient to show both that the plaintiff had made a prima facie case and discredited the defendant's reasons, the trier of fact could find discrimination had been proven. *See id.* at 880–81; *see also* Kolstad v. American Dental Ass'n, 108 F.3d 1431, 1436 (D.C. Cir. 1997) (interpreting *Hicks* in the same manner as *Aka*); Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (same).

[131] The D.C. Circuit began by framing the split in the circuits around the types of evidence a plaintiff can present at the pretext stage. *See Aka*, 156 F.3d at 1288–89. Assuming a defendant presents a nondiscriminatory reason for its actions, the crux of the plaintiff's case becomes the opportunity to demonstrate that the defendant's explanation is false. *See id.* at 1289. The language in *Hicks* recognized three types of evidence a plaintiff could use: (1) elements of the prima facie case; (2) evidence discrediting the defendant's

Circuit addressed the important questions left unclear by the Supreme Court in *Hicks*. Specifically, when is an inference of discrimination based on proof of pretext and the evidence presented in the prima facie case an appropriate finding of discrimination? Does a court have the discretion to decide when a plaintiff is permitted to present circumstantial evidence and when she is required to present direct evidence of discrimination?

1. *What Is an Appropriate Finding?*

In *Hicks*, the Supreme Court stated that "disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."[132] The Court clarified this holding by stating that there must be a "finding of discrimination" for a plaintiff to satisfy her burden of proof at the pretext stage.[133] The Court's language indicates that a plaintiff is not presumptively required to show direct evidence of discrimination to satisfy her burden.[134] Rather, as the word "may" suggests, in certain situations a plaintiff could persuade the trier of fact that she was a victim of intentional discrimination by combining proof of pretext with the evidence presented in the prima facie case.[135] Therefore, under *Hicks*, an inference of discrimination qualifies as a "finding of discrimination" in the context of satisfying the plaintiff's burden of proof at the pretext stage.[136]

The D.C. Circuit interprets this language in *Hicks* as giving considerable evidentiary weight to proof that the employer's reason is false.[137] If a plaintiff

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explanation; and (3) additional evidence of discrimination outside of what was presented in the prima facie case. *See id.* But in most employment discrimination cases, plaintiffs usually present evidence only from categories (1) and (2). *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). Thus, the focus of the proceeding at the pretext stage is whether evidence from these two categories is enough to make a strong inference of discrimination that will allow the plaintiff to survive summary judgment. *See Aka*, 156 F.3d at 1289.

[132] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

[133] *See supra* notes 103–109 and accompanying text (discussing the lack of guidance from the Supreme Court on what is an appropriate finding of discrimination).

[134] *See supra* notes 98–102 and accompanying text.

[135] *See generally Hicks*, 509 U.S. at 509–11. The Court stated that proof of pretext could combine with elements of the prima facie case to permit an inference of discrimination. *See id.* However, the plaintiff is not required to show pretext. *See id.* at 509. That is, under the language in *Hicks*, a plaintiff could still survive summary judgment with direct evidence of discrimination. *See id.* at 509–11. Therefore, *Hicks* recognized proof of pretext, the prima facie case, and direct evidence of discrimination as the types of evidence a plaintiff could present at the pretext stage. *See id.*

[136] *See supra* text accompanying notes 87–94.

[137] *See* Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1292 (D.C. Cir. 1998) (en banc).

presents evidence that shows the defendant's proffered reason is unbelievable, the plaintiff rebuts the defendant's nondiscriminatory explanation for the adverse action.[138] The only credible evidence that remains in the record is the evidence presented in the prima facie case showing the plaintiff to be qualified and yet rejected for a position. However, we generally assume that an employer acts with some reason, whether permissible or impermissible.[139] Thus, when a plaintiff discredits the defendant's legitimate reason—showing it to be a lie and not simply a mistake—the trier of fact may, in the appropriate case, infer that the real reason was an illegitimate one.[140] Therefore, under the *Aka* analysis, proof of pretext has considerable evidentiary weight because it rebuts the defendant's proffered reason and then combines with the evidence from the prima facie case to infer discrimination.[141]

However, in *Hicks*, the Supreme Court also rejected the notion that a plaintiff could satisfy her burden of proof by simply relying upon the initial presumption of discrimination from the prima facie case after she rebuts the defendant's explanation.[142] Once a defendant sets forth a legitimate explanation, the presumption from the prima facie case drops from the case.[143] The presumption cannot later be resurrected simply because the plaintiff rebuts the defendant's explanation at the pretext stage.[144] If a plaintiff were permitted to rely on the initial presumption, it would relieve her of part of her dual burden. For example, after showing the defendant's reason is false, she relies on the initial presumption of discrimination instead of satisfying her ultimate burden of proving she is a victim of intentional discrimination. Thus, despite the weight proof of pretext may have at the pretext stage, it will not have enough weight to sustain a finding of discrimination if it fails to combine proof of pretext with the evidence from the prima facie case to establish a new inference of discrimination.[145]

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138 *See id.*

139 *See id.* at 1292–93 (holding unless an employer's acts are otherwise explained, once they are rebutted we are willing to presume that they "are more likely than not based on consideration of impermissible factors") (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

140 *See Furnco*, 438 U.S. at 577. In *Furnco*, the Court explained why a plaintiff is entitled to a judgment if a defendant does not rebut her prima facie case of discrimination with a legitimate explanation. The Court's rationale was that absent an explanation, we infer an illegitimate one because we assume that an employer acts with some reason, either permissible or impermissible. *See id.* The D.C. Circuit adopts this same logic for the pretext stage: if a plaintiff rebuts the defendant's explanation, and no other legitimate explanation exists, the trier of fact is permitted to infer discrimination. *See Aka*, 156 F.3d at 1293–94.

141 *See Aka*, 156 F.3d at 1293–94.

142 *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510 (1993).

143 *See id.* at 510–11.

144 *See id.*

145 *See id.* at 511 & n.4. The Court stated that proof of pretext when combined with elements of the prima facie case "may" permit an inference of discrimination. *See id.* The Court

The D.C. Circuit resolves the question of when proof of pretext has enough weight to establish an inference of discrimination that qualifies as a finding of discrimination by focusing on issues of credibility.[146] For example,[147] the defendant explains that the plaintiff was fired due to poor work performance and customer complaints.[148] The defendant provides testimony from the plaintiff's supervisor to support the explanation, but claims it does not have the written complaints or evaluations. The plaintiff rebuts this explanation with testimony from several co-workers that claim the plaintiff was a good worker and always received compliments from customers. In addition, the plaintiff testifies that she received good performance evaluations and was never told about the complaints. The case turns on whose account of the plaintiff's performance is correct, which is a question that rests on both the plaintiff's and defendant's credibility.

The plaintiff's evidence, based on witness testimony, is sufficient to persuade the trier of fact that the defendant's explanation is unbelievable. In contrast, the defendant is lacking written evidence to support the explanation and has provided no other reason for firing the plaintiff. Moreover, the witness testimony shows the plaintiff to be a valuable employee, and thus the testimony is strong enough to permit a trier of fact to infer that the defendant's explanation is a lie and not simply a mistake based on the facts.[149] As a result, the defendant's explanation is rebutted, and the only credible evidence in the record is from the prima facie case, showing the plaintiff to be qualified and yet rejected for the position. Therefore, without any other plausible explanation, the issue of credibility raised in the proof

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later concluded that although proof of pretext sustains a finding of discrimination, there must be a finding of discrimination. *See id.* These two statements combined mean that proof of pretext can support an inference of discrimination if it combines with the evidence from the prima facie to establish a new inference of discrimination. *See id.* The Court's decision appears reasonable in light of the plaintiff's burden of proof: show the defendant's reason is false and show that discrimination is the real reason. *See id.* If a plaintiff simply relies on the initial presumption of discrimination, it would relieve her of most of her burden at the pretext stage—namely the burden of proving that the real reason for the defendant's adverse action is discrimination. *See id.*

[146] *See Aka*, 156 F.3d at 1297–99 (discussing how the plaintiff's proof of pretext raises issues of credibility over whose account of the facts is correct, which then combines with the evidence in the prima facie case to permit a strong inference of discrimination).

[147] The D.C. Circuit's analysis of how proof of pretext that raises an issue of credibility can combine with the evidence in the prima facie case to make a sufficient inference of discrimination comes largely from the facts in *Aka*. For an example of how the analysis is applied to the facts, see *infra* notes 154–83 and accompanying text. But for purposes of explaining how the *Aka* analysis works, I have chosen to do so by my own example to increase understanding.

[148] For this example, assume that the plaintiff established a prima facie case showing her to be qualified and yet rejected for the position in question.

[149] *See, e.g., Aka*, 156 F.3d at 1293 ("If the [trier of fact] can infer that the employer's explanation is not only a mistaken one in terms of the facts, but a lie, that should provide even stronger evidence of discrimination.").

of pretext combines with the evidence in the prima facie case to permit a new and sufficient inference of discrimination. This demonstrates that, under the *Aka* analysis, an inference of discrimination is an appropriate finding of discrimination to satisfy a plaintiff's burden at the pretext stage. However, it is only an appropriate finding of discrimination if proof of pretext raises an issue of credibility that combines with the evidence presented in the prima facie case to permit a strong inference of discrimination.

The *Aka* analysis is supported by three conclusions in *Hicks*. First, the D.C. Circuit's opinion reflects the Supreme Court's holding that in some situations a plaintiff may combine proof of pretext with evidence from the prima facie case to make a showing of intentional discrimination.[150] Second, the *Aka* analysis gives proof of pretext considerable evidentiary weight at the pretext stage only if it satisfies the plaintiff's burden of proof by helping establish a sufficient finding of discrimination.[151] Finally, the Supreme Court in *Hicks* stated that the defendant's burden of production precedes the credibility assessment stage.[152] Thus, in light of these conclusions in *Hicks*, the D.C. Circuit's analysis is based upon issues of credibility to determine when a plaintiff can rely on an inference of discrimination to survive summary judgment at the pretext stage is appropriate.

2. *Who Decides?*

A related question to whether an inference of discrimination is an appropriate finding of discrimination in order to satisfy a plaintiff's burden at the pretext stage is who decides when it is appropriate. Specifically, does a lower court have the discretion to decide when a plaintiff is permitted to rely on circumstantial evidence and when she is required to present direct evidence of discrimination? Under the *Aka* analysis, a plaintiff can survive summary judgment without direct evidence when her proof of pretext raises an issue of credibility and then combines with the evidence presented in the prima facie case to permit a strong inference of discrimination. It has long been held that issues of credibility are "quintessentially" ones for the jury.[153] Therefore, under the *Aka* analysis of when a plaintiff can employ the opportunity to survive summary judgment without direct evidence that was preserved in *Hicks*, lower courts have no discretion to

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[150] *See Hicks*, 509 U.S. at 511–12.

[151] *See supra* notes 132–41 and accompanying text.

[152] *See Hicks*, 509 U.S. at 509 (holding whether a defendant's explanation is credible is irrelevant because the "burden of production . . . can involve no credibility assessment [f]or the burden-of-production determination necessarily precedes the credibility-assessment stage").

[153] *See Aka*, 156 F.3d at 1299 ("Determining the weight and credibility of witness testimony . . . has long been held to be the 'part of every case that belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'") (citing United States v. Scheffer, 523 U.S. 303, 308 (1998) (quoting Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891)).

require a plaintiff to present direct evidence at the pretext stage.

C. *Applying the* Aka *Analysis of* Hicks *to the Facts*

To explain the *Aka* analysis of *Hicks*, the D.C. Circuit applied it to the facts of *Aka*.[154] In other words, the D.C. Circuit demonstrated how under *Hicks* a plaintiff could survive summary judgment at the pretext stage with circumstantial evidence. As recognized in *Hicks*, defendants often rebut the presumption of discrimination with a subjective reason for their actions.[155] For example, personal animus towards a plaintiff, whether articulated by the defendant or in the record, could qualify as a defendant's legitimate explanation.[156] The trier of fact need not find the defendant's reason credible; it must only find that the defendant's explanation is legitimate and nondiscriminatory.[157] The credibility assessment stage comes after the defendant satisfies the burden of production.[158] Thus, when a defendant proffers an explanation, the trier of fact's only duty is to determine if an issue of fact exists as to whether the plaintiff was a victim of discrimination.[159]

Although subjective reasons may satisfy the defendant's burden of production, the reasons are evaluated differently at the pretext stage.[160] For example, in *Aka* the defendant stated that a lack of experience in pharmacy services, knowledge of the field, and enthusiasm for the pharmacy position were the reasons why the plaintiff was not hired.[161] This qualified as a legitimate and nondiscriminatory reason because it essentially claimed that the defendant did not find the plaintiff "qualified" for the position under its own criteria.[162]

However, evidence from the plaintiff's prima facie case showed that he was indeed qualified, if not over qualified, for the pharmacy position.[163] The plaintiff had nineteen years of experience at WHC as an orderly.[164] During these nineteen years, the plaintiff had made frequent trips to the pharmacy to pick up and deliver medications to and from the pharmacy.[165] Moreover, the record showed that during these frequent visits, the plaintiff had acquired knowledge of the names of

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[154] *See id.* at 1294–1300.

[155] *See* discussion *supra* note 84.

[156] *See Aka*, 156 F.3d at 1298.

[157] *See id.* at 1298–99.

[158] *See supra* note 84 and accompanying text.

[159] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509–11 (1993).

[160] *See id.* at 509.

[161] *See Aka*, 156 F.3d at 1294–96.

[162] *See id.* at 1294–95.

[163] *See id.* at 1294–97 (noting that Aka had prior pharmacy experience and sufficient knowledge of medical terminology).

[164] *See id.* at 1296.

[165] *See id.*

various medications, the general functions of the medications, the manner in which the medications were to be administered, and the medications that were considered dangerous.[166] In contrast, the hired applicant's experience was limited to one year of employment in WHC's laundry room and two months of volunteer experience in the pharmacy.[167] The defendant cited the hired applicant's employment in a medical laboratory as proof of his knowledge of terminology.[168] However, his duties were primarily limited to picking up and delivering medical specimens—not medications. Thus, it would be reasonable for the trier of fact to conclude that the hired applicant did not have much knowledge of medical terminology.[169]

Aka combined evidence from his prima facie case with witness testimony to raise an issue of credibility over whether he had expressed enthusiasm for the position.[170] The defendant stated that the plaintiff had shown a lack of enthusiasm during the interview[171] and claimed that this influenced the decision not to hire him.[172] In support of this explanation, the defendant noted that the hired applicant had demonstrated his enthusiasm by previously applying for the position and then volunteering in the pharmacy after he was rejected to increase his future chances of being hired.[173] However, there was ample evidence in the record that showed the plaintiff expressed enthusiasm for the job equal to, or even more than, the hired applicant's enthusiasm. For example, because the plaintiff wanted to move up the ranks at WHC, he successfully pursued both a bachelor's degree and a master's degree in hospital administration.[174] The plaintiff also volunteered in various administrative jobs during his nineteen years at the hospital.[175] Furthermore, the plaintiff testified that he recalled verbalizing his enthusiasm for the pharmacy position during the interview.[176]

Although the defendant's subjective criteria was initially a legitimate reason for not hiring Aka, it loses its legitimacy if the plaintiff rebuts the reason at the pretext stage.[177] Aka presented evidence that he was qualified and yet rejected to

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166 *See id.* at 1297.

167 *See id.* at 1295–96.

168 *See id.* at 1297.

169 *See id.*

170 *See id.* at 1298.

171 *See id.* at 1297.

172 *See id.* at 1297–99. Although the defendant stated the plaintiff exhibited a lack of enthusiasm, the interviewer did not write this down on the interview assessment sheet. *See id.* Thus it raises the question: if enthusiasm was an important qualification for the pharmacy position, why was it not important enough for the interviewer to note in her initial assessment?

173 *See id.* at 1297–98.

174 *See id.* at 1298.

175 *See id.*

176 *See id.*

177 *See id.* at 1292.

make a prima facie case of discrimination.[178] The defendant successfully rebutted Aka's prima facie case by stating he was not qualified for the position primarily because he lacked enthusiasm for the job.[179] However, at the pretext stage, Aka's testimony about the interview indicated that he had expressed his enthusiasm to the interviewer.[180] As a result, the circumstantial evidence raised an issue of credibility: whose account of the interview was correct?[181]

The plaintiff's proof of pretext is sufficient to persuade a reasonable trier of fact that the defendant's explanation is unbelievable.[182] Moreover, this proof of pretext raises an issue of credibility over whose account of the interview is correct—did Aka express his enthusiasm for the position? If he did, then the defendant lied about Aka failing to meet the subjective qualifications for the position. If Aka did not express his enthusiasm, then the defendant's explanation that the hired applicant was more enthusiastic is a legitimate explanation for not hiring Aka. As such, under the D.C. Circuit's analysis, Aka's proof of pretext, which raises an issue of credibility, combines with the evidence presented in the prima facie case to persuade a trier of fact to permit an inference of discrimination. Because issues of credibility are for a jury to decide, the D.C. Circuit correctly held that Aka's claim should be presented before a jury.[183]

D. *Conclusions from* Aka

In this section, I will demonstrate why the D.C. Circuit's interpretation of *Hicks* in *Aka v. Washington Hospital Center* is the correct analysis for determining how a plaintiff survives summary judgment at the pretext stage with circumstantial evidence. First, I will compare the *Aka* analysis to those circuit courts that apply a "pretext-sometimes" approach to employment discrimination cases. Second, based upon this comparison, I will explain why the D.C. Circuit got it right when it came to interpreting and applying *Hicks*.

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178 *See id.* at 1294.

179 *See id.* at 1297–98.

180 *See id.* at 1298.

181 *See id.*

182 *See id.* at 1299–1300.

183 *See id.*

1. *"Pretext-Sometimes"*

After *Hicks*, a new middle ground emerged,[184] holding that in the appropriate case circumstantial evidence discrediting the defendant's explanation will combine with evidence from the prima facie case to support an inference of intentional discrimination.[185] An appropriate situation is defined as one in which substantial evidence in the record supports a finding that the defendant's reasons were false and that a reasonable inference of discrimination can be drawn from that evidence.[186] That is, an appropriate situation is one in which a plaintiff satisfies her burden of proof at the pretext stage with circumstantial evidence.

For example, evidence in the record shows that the defendant had fabricated the reasons for not hiring the plaintiff, and there was not a credible explanation to the contrary.[187] In addition, evidence from the prima facie case proves that the plaintiff is qualified for the position in question. Pretext-sometimes courts would conclude that such evidence permits a reasonable inference of discrimination and that no additional evidence is required.[188]

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[184] As will be discussed, "pretext-sometimes" is different from those "permissive pretext" courts, which created the middle ground in the post-*Burdine* debate over the pretext stage. *See supra* notes 73–76 and accompanying text. Following *Burdine*, permissive pretext courts tried to maintain a middle ground between pretext-always and pretext-plus courts. They held that upon proof of pretext a trier of fact may, but is not required to, permit an inference of discrimination. But the Supreme Court dismissed the permissive pretext approach in *Hicks* when it stated definitively that proof of pretext may permit an inference of discrimination if it combines with elements from the prima facie case. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

[185] *See, e.g.*, Barnett v. Dep't of Veterans Affairs, 153 F.3d 338, 341–42 & n.4 (6th Cir. 1998) (holding that a plaintiff may rely on circumstantial evidence in the record and stating that "*Hicks* merely requires that the fact-finder decide the case on the facts"); Fisher v. Vassar College, 114 F.3d 1332, 1338–40 (2d Cir. 1997) (holding that a plaintiff can rely on a finding of pretext and evidence from a prima facie case if it establishes "intentional discrimination by a preponderance of the evidence"); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (holding that a plaintiff could use circumstantial evidence from her prima facie case, which "[i]n tandem with . . . the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence of discrimination"); Woodman v. Haemonetics Corp., 51 F.3d 1087, 1092 (1st Cir. 1995) ("The plaintiff-employee may rely upon the same evidence to establish both pretext and discrimination, provided it is adequate to enable a rational factfinder to infer that the intentional age-based discrimination was a determinative factor in the adverse employment action.").

[186] *See, e.g.*, *Fisher*, 114 F.3d at 1338–40; *Rhodes*, 75 F.3d at 994; Udo v. Tomes, 54 F.3d 9, 13 (1st Cir. 1995); *Woodman*, 51 F.3d at 1092.

[187] *See Rhodes*, 75 F.3d at 996.

[188] *See* cases cited *supra* note 185.

The Fifth Circuit exemplifies this pretext-sometimes position. In *Rhodes v. Guiberson Oil Tools*,[189] the Fifth Circuit affirmed a jury verdict that the plaintiff had been discriminated against because of his age.[190] Rhodes was a fifty-six year-old salesman who was discharged after thirty years of employment with the defendant.[191] The defendant explained to Rhodes that his termination was due to a reduction in the workforce and that he would be considered for rehiring when the crisis ended.[192] But two months later, a forty-two-year-old man was hired for the same job. Evidence in the record revealed that his position was vacant for only six weeks before it was refilled and that his supervisor had known at the time of Rhodes's termination that he would be replaced.[193] However, the defendant did not deny that it had lied to Rhodes about his discharge.[194] Rather, it defended its actions by stating that Rhodes was terminated due to poor performance.[195]

The plaintiff's evidence in the record rebutted the defendant's explanation with a question of credibility. Several witnesses testified that Rhodes was an experienced and skilled salesman who was well regarded in his field.[196] The Fifth Circuit concluded that the conflict over Rhodes's testimony sufficiently discredited the defendant's proffered reasons for his discharge.[197] Moreover, Rhodes's prima facie case had proven him to be a qualified salesman. Therefore, the Fifth Circuit held that proof of pretext and evidence from the prima facie case combined could convince a reasonable jury that the defendant's reasons were false and discrimination was the real reason.[198]

The Fifth Circuit's pretext-sometimes approach is parallel to the D.C. Circuit's decision in *Aka* in several important respects. Both courts interpreted *Hicks* as permitting the plaintiffs to satisfy their burdens of proof at the pretext stage with circumstantial evidence. Moreover, these courts held that evidence of pretext could combine with the plaintiff's prima facie case to support an inference of intentional discrimination. Once this inference is established, both the *Aka* and *Rhodes* courts conclude that the plaintiff is not required to present additional evidence of discrimination to satisfy her burden of proof. Therefore, based upon these similarities, the D.C. Circuit's interpretation of *Hicks* gains support from

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189 75 F.3d 989 (5th Cir. 1996).

190 *See id.* at 996–97.

191 *See id.* at 991–92.

192 *See id.* at 992.

193 *See id.* at 995.

194 *See id.*

195 *See id.*

196 *See id.* at 995–96.

197 *See id.* at 996 (explaining that the jury was entitled to find the defendant's proffered reasons to be false).

198 *See id.*

courts like the Fifth Circuit who take the middle ground in the debate over pretext.

However, the *Aka* and *Rhodes* courts differ over the use of issues of credibility to help determine whether a plaintiff survives summary judgment at the pretext stage.[199] The Fifth Circuit appeared convinced that Rhodes had raised questions of credibility in which a reasonable juror could make a finding of discrimination based upon the evidence. But the *Rhodes* court did not go so far as to conclude that proof of pretext deserves considerable evidentiary weight to satisfy a plaintiff's burden of proof when it raises issues of credibility that combine with evidence in the prima facie case to establish an inference of discrimination. It may be reasonable to assume, based upon the evidence before the court and its ultimate holding, that the Fifth Circuit finds this to be the appropriate standard for a plaintiff's burden of proof at the pretext stage. But the *Rhodes* court did not go so far as to specifically state this in its opinion.

Thus, despite supportive similarities between the standard in *Aka* and the pretext-sometimes approach demonstrated in *Rhodes*, the D.C. Circuit's interpretation of *Hicks* is independent from all other courts. It is an analysis of circumstantial evidence that is unabashedly based upon issues of credibility and can be applied to most employment discrimination cases at the pretext stage. For example, consider the outcome in *Rhodes* under the *Aka* analysis if the issue were whether the plaintiff presented a material issue of fact to survive summary judgment at the pretext stage. The record of evidence would show Rhodes to be a qualified salesman. In addition, conflicting testimony over those qualifications would raise an issue of credibility; while Rhodes and other witnesses testified to Rhodes's skill and expertise, the defendant claims that Rhodes had poor job performance. The Fifth Circuit's pretext-sometimes interpretation of *Hicks* would compel it to find that Rhodes had fulfilled his burden of proof: the evidence showed that the defendant's reasons were false, and this proof of pretext permitted an inference of discrimination.

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[199] *See supra* notes 147–149 and accompanying text. The two courts also differ in the sense that the plaintiff in *Rhodes* had already been before a jury. Thus, the D.C. Circuit's discussion focused on summary judgment, whereas the Fifth Circuit's decision dealt with judgment as a matter of law. As a result, there were some natural differences in the courts' analysis. Therefore, perhaps the Fifth Circuit's analysis did not cover or incorporate issues of credibility because *Rhodes* had already been to trial. But the *Rhodes* court wrote the opinion to encompass the issue of how a plaintiff can survive summary judgment. *See id.* at 993. Moreover, incorporating issues of credibility into an analysis of a motion for judgment as a matter of law would be appropriate considering issues of credibility are for the jury to decide. Thus, if a plaintiff presents evidence showing the defendant's explanation is false and raises issues of credibility that combine with the circumstantial evidence the plaintiff presented, the jury could infer the plaintiff was a victim of intentional discrimination. As such, the defendant's motion for a judgment as a matter of law would be denied. Therefore, the Fifth Circuit's failure to include issues of credibility into the *Rhodes* analysis was more likely an oversight of the significance of such issues.

Under the *Aka* analysis of *Hicks*, the Fifth Circuit's conclusion would be stated differently, but the substance of the holding would still be the same. That is, proof of pretext raised an issue of credibility over whether Rhodes was qualified for the position. This issue of credibility, combined with the evidence in the prima facie case, showed that the plaintiff was qualified and yet fired. Thereby, a strong inference of discrimination is created. Because issues of credibility are for a jury to decide, the Fifth Circuit would arrive at the same conclusion as the D.C. Circuit in *Aka*: summary judgment is inappropriate, and the case should go to trial.

2. *Why* Aka *Got it Right*

The comparison between *Rhodes* and *Aka* is important because it supports the conclusion that the D.C. Circuit got it right when in it came to interpreting and applying *Hicks*. Under the *Aka* analysis, the Supreme Court permits the plaintiff to use either direct or circumstantial evidence to satisfy her burden of proof at the pretext stage. This is a reasonable conclusion considering most plaintiffs in employment discrimination cases do not have direct evidence that their employers were motivated by discrimination.[200] But the Supreme Court wanted to ensure that if a plaintiff relied upon circumstantial evidence, she would not simply prove pretext and then rely upon the initial presumption of discrimination from the prima facie case.[201] The Supreme Court resolved its concern that defendants would be held liable without proof of discrimination by requiring plaintiffs to show that the defendant's reasons were false and that discrimination was the real reason.[202] The plaintiff must satisfy this burden of proof whether she presents circumstantial or direct evidence.

The D.C. Circuit demonstrated how a plaintiff satisfies this burden at the pretext stage when she presents circumstantial evidence. Aka's experience and recollection of stating his enthusiasm for the position in the interview were clearly stated in the record.[203] This raised a question over the defendant's credibility, for it claimed that Aka was not qualified for the job and expressed no enthusiasm for the position to the interviewer.[204] Thus, the evidence that discredited the defendant's reason thereby rebutted its explanation and raised an issue of credibility over which account of the facts was correct. With no other credible explanation, proof of pretext combined with the evidence in the prima facie case—showing the defendant to be qualified and yet rejected—to establish a new inference of discrimination. As a result, the *Aka* analysis compliments the two

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200 *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

201 *See supra* notes 83–86 and accompanying text.

202 *See* Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1293 (D.C. Cir. 1998) (en banc).

203 *See id.* at 1298.

204 *See id.* at 1299.

significant effects the *Hicks* decision had on employment discrimination jurisprudence. First, a defendant is not held liable unless plaintiffs persuade the trier of fact that they are more likely than not the victims of intentional discrimination. Second, plaintiffs have a realistic opportunity of satisfying their burdens of proof and having a jury decide their claims.

V. IMPACT OF *AKA V. WASHINGTON HOSPITAL CENTER*

In this section, I will argue that the *Aka* analysis itself is significant to employment discrimination jurisprudence for three reasons. First, it interprets *Hicks* consistently with the language of the whole opinion, and thus diffuses extreme positions in the debate over pretext that focus only on selected language in *Hicks*. Second, the analysis ensures that plaintiffs will have a realistic opportunity to make their claims. Therefore, *Aka* is consistent with a recent Supreme Court trend that favors the expansion of a plaintiff's opportunity to make her claim. Finally, the *Aka* analysis is consistent with the overall purpose of antidiscrimination statutes that provide employees the opportunity to hold their employers liable for the discrimination they encounter in the workplace.

A. *Diffusing the Extremes*

In the post-*Burdine* era, two extreme positions developed. Some circuit courts held that a plaintiff's circumstantial evidence to prove pretext was enough to permit a reasonable trier of fact to make an inference of intentional discrimination.[205] Other courts required plaintiffs to provide additional evidence of discrimination beyond proof of pretext to satisfy their burdens of proof.[206] These "pretext-always" and "pretext-plus" courts did not change their position after *Hicks*. But in light of the D.C. Circuit's recent interpretation and application of *Hicks*, *Aka v. Washington Hospital Center* shows that these positions in the debate over pretext are inconsistent with the language in *Hicks*. Therefore, in this section, I will contrast the *Aka* analysis with the "pretext-always" and "pretext-plus" positions to demonstrate why the D.C. Circuit is the more appropriate interpretation of *Hicks*.

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[205] *See supra* notes 69–72 and accompanying text (discussing the "pretext-always" approach).

[206] *See supra* notes 65–68 and accompanying text (discussing the "pretext-plus" approach).

1. *"Pretext-Always"*

The Third Circuit used *Sheridan v. E.I. DuPont de Nemours & Co.*[207] as an opportunity to clarify its opinion on the kind of evidence a plaintiff must present to persuade the fact finder that she was a victim of intentional discrimination.[208] In *Sheridan*, the plaintiff (Sheridan) was a Head Captain in one of the defendant's hotel dining rooms.[209] Sheridan had complained about a failure to promote her, and as a consequence, she claimed that the defendant retaliated against her by taking disciplinary action and creating a difficult work environment.[210] In response, Sheridan sued the defendant for sex discrimination and retaliation.[211]

The record of evidence showed that Sheridan was considered a valuable and highly regarded employee.[212] She had received favorable evaluations from her supervisors and was rated an outstanding employee by her peers.[213] However, the defendant claimed that Sheridan's performance was deteriorating and that management had received complaints about her performance.[214] The defendant's strongest defense was that Sheridan had given away free food and drinks ("comping") while she was on duty.[215] The defendant claimed Sheridan's comping started an investigation into her behavior and resulted in a decision to reassign Sheridan to another position.[216]

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[207] 100 F.3d 1061 (3d Cir. 1996).

[208] *See id.* at 1063. It is important to note that at issue in *Sheridan* was the defendant's motion for judgment as a matter of law. *See id.* Thus, similar to the Fifth Circuit's decision in *Rhodes*, see *supra* text accompanying note 18, there are differences between the D.C. Circuit's opinion in *Aka* and the Third Circuit in *Sheridan*. But both situations require an assessment of whether the evidence permits a finding of discrimination, and thus the standards they set forth are comparable. Moreover, the Third Circuit addressed the issue of pretext specifically to put forth its interpretation and application of *Hicks*. *See Sheridan*, 100 F.3d at 1066–67. Therefore, the Third Circuit wrote its opinion broadly enough to encompass both motions for judgment as a matter of law and summary judgment.

It is also important to note that the district court judge decided some of the issues in the case. *See id.* at 1063. The conduct subject to the suit spanned before and after November 21, 1991, the date the 1991 Civil Rights Act was enacted, which granted plaintiffs the opportunity of a jury trial. *See id.* at 1063–64 (citing Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991)). Therefore, a jury served as the fact finder for conduct that occurred after such date, and the judge would be the fact finder for the conduct prior to such date.

[209] *See id.* at 1063.

[210] *See id.*

[211] *See id.*

[212] *See id.* at 1072–73.

[213] *See id.*

[214] *See id.* at 1073.

[215] *See id.* at 1074.

[216] *See id.*

Sheridan rebutted the defendant's explanation by testifying that the defendant did not consider female employees for managerial positions.[217] When she complained that this failure to promote was gender discrimination, Sheridan claimed her supervisor warned her that he planned to watch her closely.[218] In response to the alleged comping, Sheridan presented evidence that showed she was on jury duty during a period she allegedly gave away free drinks.[219] A jury found for the defendant on the failure to promote and retaliation claims, but found for Sheridan on her constructive discharge claim.[220]

The jury awarded Sheridan compensatory damages,[221] and the defendant moved for a judgment as a matter of law. The district court ruled in the defendant's favor.[222] The district court held that although Sheridan's evidence showed the defendant's explanations for the investigation to be pretextual, nothing in the record showed that the defendant's motivation was gender discrimination.[223]

Deciding the case for a second time,[224] the Third Circuit stated that it understood *Hicks* to permit a trier of fact to find an inference of discrimination from evidence in the prima facie case and proof of pretext.[225] It also interpreted *Hicks* as requiring plaintiffs to show the defendant's reasons are false and that discrimination is the real reason in order to survive summary judgment or judgment as a matter of law.[226] However, the Third Circuit defined the two prongs of the plaintiff's burden of proof as conjunctive: a plaintiff must show, with circumstantial or direct evidence, that (1) the defendant's reasons are false, or (2) it is more likely than not that the defendant was motivated by discrimination.[227] The court found that under *Hicks*, requiring a plaintiff to prove more than pretext to sustain a finding of discrimination is inconsistent with the plaintiff's burden of persuasion. Under *Hicks*, a plaintiff is only required to present enough evidence to establish a finding of discrimination.[228] Thus, because

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217 *See id.*

218 *See id.*

219 *See id.*

220 *See id.*

221 *See id.* at 1064.

222 *See id.*

223 *See* Sheridan v. E.I. DuPont de Nemours & Co., No. 93-46, 1994 WL 828309, at *9 (D. Del. July 14, 1994). The district court found that Sheridan's supervisor warning to her that she would be watched did not support an inference that gender was a motivating factor in the defendant's decision. *See id.*

224 *See* Sheridan v. E.I. DuPont de Nemours & Co., No. 94-7509, 1996 WL 36283, at *1 (3d Cir. Jan. 31, 1996), *vacated*, 74 F.3d 1459 (3d Cir. 1996).

225 *See Sheridan*, 100 F.3d at 1066–67.

226 *See id.* at 1067 (citing Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)).

227 *See id.*

228 *See id.* at 1068–69.

a prima facie case permits an inference of discrimination, the *Sheridan* court concluded that this was an appropriate finding to fulfill a plaintiff's burden at the pretext stage.[229]

Although the prima facie case drops once the defendant proffers a legitimate and nondiscriminatory reason, the evidence used in the prima facie case still has probative value.[230] Thus, a plaintiff can combine proof of pretext with the elements of the prima facie case to support an inference of discrimination.[231] The Third Circuit concluded that a plaintiff can survive summary judgment or judgment as a matter of law if she provides enough circumstantial evidence to create a genuine issue of material fact that the defendant's proffered reasons were untrue.[232] Based upon witness testimony and the evidence in the prima facie case, the court held that Sheridan had presented enough circumstantial evidence to lead a reasonable jury to disbelieve the defendant and reject its credibility.[233] Therefore, the Third Circuit held that the jury was permitted to find for Sheridan on her constructive discharge claim.[234]

The D.C. Circuit agreed with the Third Circuit that proof of pretext and elements of the prima facie case could combine to permit an inference of intentional discrimination. But the *Aka* court faulted the Third Circuit for taking this interpretation too far.[235] In *Sheridan*, the court interpreted *Hicks* as permitting a plaintiff to prove either that the defendant's reason was unbelievable or that discrimination was the real reason for the action.[236] The D.C. Circuit found this an impermissible reading of *Hicks* in light of the Supreme Court's clear requirement that a plaintiff prove both that the reason was false and that discrimination was the real reason.[237]

The *Aka* court provided two examples to explain why the Third Circuit's "pretext-always" interpretation of *Hicks* was inappropriate.[238] First, plaintiffs have been known to "shoot themselves in the foot" by acknowledging that a nondiscriminatory reason was the defendant's motive in the adverse action.[239] Second, plaintiffs often present weak circumstantial evidence to show that the defendant's explanation was false, which does not sustain the finding of

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229 *See id.* at 1069.

230 *See id.*

231 *See id.*

232 *See id.* at 1067.

233 *See id.* at 1075.

234 *See id.*

235 *See* Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1289–90 (D.C. Cir. 1998) (en banc).

236 *See Sheridan*, 100 F.3d at 1069.

237 *See Aka*, 156 F.3d at 1291–92.

238 *See id.* at 1291.

239 *See id.*

discrimination from the prima facie case.[240] In both examples, there is no legitimate jury question as to discrimination. Thus, the D.C. Circuit concluded that there is no point in sending either case to the jury without additional evidence of discrimination.[241]

A pretext-always court like the Third Circuit would never require additional evidence of discrimination once the plaintiff presented enough circumstantial evidence to convince the trier of fact that the defendant's explanation was false.[242] Thus, the D.C. Circuit was compelled to reject the Third Circuit's interpretation of *Hicks* because it failed to fully enforce a plaintiff's burden. The D.C. Circuit feared that the Third Circuit's analysis in *Sheridan* would result in sending employment discrimination cases to a jury prematurely.[243]

It is important to note, however, that there are significant similarities in how the D.C. Circuit and the Third Circuit interpret *Hicks*. For example, both courts agree that *Hicks* permitted plaintiffs to present either direct or circumstantial evidence to satisfy their burden of proof at the pretext-stage.[244] Moreover, both courts found this option to be consistent with the Court's requirement for a finding of intentional discrimination. That is, the D.C. Circuit and the Third Circuit agreed that, regardless of whether a plaintiff presents direct or circumstantial evidence, a plaintiff would still have to prove that the defendant's reasons were false and that discrimination was the real reason.[245]

Despite the similarities in the D.C. Circuit's and the Third Circuit's interpretation of *Hicks*, the courts split over how a plaintiff is required to satisfy her burden of proof at the pretext stage. The Third Circuit described the plaintiff's two-prong burden as conjunctive: a plaintiff must prove either that the defendant's reason was false or that discrimination was the real reason.[246] The court reasoned that once a plaintiff proves pretext and combines it with evidence from the prima facie case, she has made an inference of discrimination that satisfies the finding of discrimination required by *Hicks*.[247] However, it is hard to ignore the Supreme Court's overt concern that a defendant should not be held liable for discrimination if a plaintiff merely relies on the initial presumption of discrimination, made in the prima facie case, after it was rebutted by the defendant.[248] Unless a court requires a new finding of discrimination at the

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[240] *See id.*

[241] *See id.*

[242] *See* Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1066–67 (3d Cir. 1996).

[243] *See Aka*, 156 F.3d at 1292.

[244] *Compare Aka*, 156 F.3d at 1292, *with Sheridan*, 100 F.3d at 1066–67.

[245] *Compare Aka*, 156 F.3d at 1292–93, *with Sheridan*, 100 F.3d at 1068–69.

[246] *See Sheridan*, 100 F.3d at 1066–67.

[247] *See id.*

[248] *See Aka*, 156 F.3d at 1290–91 (holding that the D.C. Circuit was compelled to reject the pretext-always position because the weight of pretext under *Hicks* must be interpreted

pretext stage, it is likely that its application of *Hicks* will not satisfy the Supreme Court's concerns for the defendant.

Because of an inherent inconsistency with the language in *Hicks*, the D.C. Circuit rejected the Third Circuit's pretext-always approach. Alternatively, the D.C. Circuit held that proof of pretext has considerable evidentiary weight when it raises issues of credibility and combines with evidence from the prima facie case to make a strong inference of discrimination.[249] As a result, a plaintiff renews the inference of discrimination and presents a material issue of fact for a jury to decide. Therefore, the D.C. Circuit was able to balance the Supreme Court's requirement that a finding of discrimination be made to protect defendants with a plaintiff's opportunity to rely on circumstantial evidence to survive summary judgment at the pretext stage.

2. *"Pretext-Plus"*

The First Circuit has held that although a plaintiff proves pretext by raising an issue of the defendant's credibility, it must provide additional evidence to persuade a trier of fact that the defendant was motivated by discrimination. In *Hidalgo v. Overseas Condado Insurance Agencies, Inc.*,[250] just before the plaintiff's (Hidalgo) sixty-fifth birthday, his employer informed him that he was expected to retire in accordance with company policy.[251] After Hidalgo informed the defendant that he did not intend to retire, the defendant explained to him that it planned to eliminate his department by integrating it with another division and that Hidalgo would not be extended an offer.[252] Hidalgo sued the defendant for age discrimination.[253] The defendant claimed Hidalgo was terminated because his division had become unprofitable, and it had received complaints about Hidalgo's work performance.[254]

The district court granted the defendant's motion for summary judgment, holding that Hidalgo failed to prove the defendant's reasons were pretextual or provide additional evidence of the defendant's discriminatory motives.[255] The First Circuit affirmed the district court's decision, finding Hidalgo's circumstantial evidence did not support a finding of intentional discrimination.[256] The First Circuit interpreted *Hicks* as requiring plaintiffs to show that the

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consistently with the Court's intentions and entire opinion).

[249] *See id.* at 1292–94.

[250] 120 F.3d 328, 337 (1st Cir. 1997).

[251] *See id.* at 331.

[252] *See id.*

[253] *See id.*

[254] *See id.* at 334.

[255] *See* Hidalgo v. Overseas Condado Ins. Agencies, Inc., 929 F. Supp. 555, 561 (D. P.R. 1996).

[256] *See Hidalgo*, 120 F.3d at 337.

defendant's explanation was pretext and that the real reason for the action was discrimination. It also noted that a plaintiff could satisfy her burden with direct or circumstantial evidence and that the defendant's proffered reason was not true.[257]

Although the First Circuit conceded that evidence from the prima facie case could have evidentiary weight and that an inference of discrimination could satisfy the plaintiff's burden, it did not apply this standard in *Hidalgo*.[258] Hidalgo offered circumstantial evidence from the record to prove the defendant's explanation was pretext and that discrimination was the real reason for his termination. For example, witness testimony revealed that Hidalgo was qualified for the position and that Hidalgo himself was never informed of any complaints about his work performance.[259] Moreover, evaluation sheets rated Hidalgo as a valuable employee.[260] By contrast, the defendant failed to provide any figures to support its proffered explanation that Hidalgo was terminated because his division was not profitable.[261]

The First Circuit assumed arguendo that Hidalgo established pretext,[262] but concluded that Hidalgo's circumstantial evidence failed to show that the defendant was motivated by discriminatory animus.[263] Interestingly, the First Circuit did not really explain why it came to this conclusion. The only guidance the First Circuit gave was that the ADEA does not prevent an employer from terminating employees it wants to without evidence of discriminatory intent.[264] In this case, the evidence merely showed that the defendant expected its employees to retire when they were eligible for retirement benefits.[265] Thus, the First Circuit's lack of reasoning suggests that a plaintiff must provide additional evidence, outside of proof of pretext and evidence from the prima facie case, to

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257 *See id.* at 335.

258 *See id.*

259 *See id.* at 335–36.

260 *See id.*

261 *See id.*

262 *See id.* at 336–37. The First Circuit stated that whether Hidalgo established pretext was a "close call." *Id.* Hidalgo had used circumstantial evidence to raise an issue of credibility over whether the defendant did in fact receive complaints about Hidalgo's work performance and whether his department was losing money. *See id.* According to Hidalgo, he was never told about any such complaints nor was he shown any evidence that proved his department was unprofitable. *See id.* Precedent in the First Circuit based on similar evidence stated such issues should be decided by a jury. *See, e.g.*, Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 675 (1st Cir. 1996). But, without explanation, the court doubted whether Hidalgo's evidence was similar enough to be guided by such precedent. *See Hidalgo*, 120 F.3d at 337. Nonetheless, because the First Circuit based its decision on proof of discrimination, it concluded that Hidalgo established pretext without deciding the issue. *See id.* at 337.

263 *See Hidalgo*, 120 F.3d at 337.

264 *See id.*

265 *See id.* at 337–38.

persuade the trier of fact that she was a victim of discrimination.[266]

The D.C. Circuit properly criticized the First Circuit's decision as running contrary to the complete holding of *Hicks*. The *Aka* court conceded that circumstantial evidence that rebuts the defendant's proffered reason will not always permit an inference of discrimination.[267] But in *Hicks*, the Supreme Court held that no additional evidence is necessary once the plaintiff has rebutted the defendant's explanation with proof of pretext, and then combines that proof with evidence from the prima facie case to permit an inference of discrimination.[268] Thus, the D.C. Circuit concluded that it is incorrect to interpret *Hicks* as presumptively requiring plaintiffs to present additional evidence of discrimination beyond that rebuttal.[269]

In the *Hidalgo* opinion, the First Circuit gave no weight to the plaintiff's rebuttal evidence without explaining why it was insufficient.[270] Thus, the *Hidalgo* court made its decision without properly considering the weight of the evidence that raised issues of credibility over Hidalgo's alleged poor performance and low

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[266] For another example of "pretext-plus," see *Thomas v. Randolph Hills Nursing Center*, No. 97-2642, 1998 WL 454088, at *1 (4th Cir. July 28, 1998). Following several similar decisions, the Fourth Circuit held in *Thomas* that the pretext-plus position is the most favorable interpretation of *Hicks*. *See id.* at *3. The court stated that proof of pretext does not diminish the plaintiff's burden of persuading the trier of fact that discrimination motivated the defendant's actions. *See id.* In *Thomas*, the plaintiff was a fifty-five year-old nurse and evening supervisor in the West Wing of the hospital. *See id.* at *1. The plaintiff's hours were reduced when a thirty-three year-old nurse was hired as the West Wing's Coordinator. *See id.*

The defendant explained its action by claiming the West Wing was not being properly run, and the hired nurse had management experience. *See id.* Moreover, the defendant had received complaints from patients and doctors regarding the plaintiff, and the plaintiff had received a bad work evaluation. *See id.* The plaintiff offered, as evidence in the pretext stage, testimony from the Director of Nursing that she never signed nor remembered preparing a poor evaluation of the plaintiff nor received any complaints about her. *See id.* In addition, the plaintiff claimed that she always received good evaluations and had never received any complaints about her work. *See id.* The record also showed that there was no documentation of any complaint. *See id.* Adhering to a pretext-plus approach, the Fourth Circuit found that the plaintiff's evidence at most made the defendant's evidence less credible, but she did not present any evidence of "animus directed towards [the plaintiff] due to her age." *Id.* at *2; *see also, e.g.*, Gillins v. Berkeley Electric Cooperative, Inc., 148 F.3d 413, 416–17 (4th Cir. 1998) (holding that although the plaintiff presented circumstantial evidence that raised a genuine issue of fact that the defendant's reasons were false, the plaintiff did not fulfill his double duty because he did not develop any evidence that the defendant was motivated by discrimination); Vaughn v. Metrahealth Cos., Inc., 145 F.3d 197, 202 (4th Cir. 1998) (holding that under a plaintiff's double duty, pretext-plus is the best approach because it "preserves the character of statutes like the ADEA as antidiscrimination statutes" due to the requirement that actual intentional discrimination be proven).

[267] *See* Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1289 (D.C. Cir. 1998) (en banc).

[268] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

[269] *See Aka*, 156 F.3d at 1291.

[270] *See Hildalgo*, 120 F.3d at 336–37.

profits.[271] It simply dismissed this evidence as insignificant to show that the defendant was motivated by age discrimination.[272] However, as the D.C. Circuit pointed out, *Hicks* permits a plaintiff to combine proof of pretext with the evidence from the prima facie case to show intentional discrimination if it establishes a strong inference of discrimination.[273] Therefore, the D.C. Circuit concluded that the First Circuit's apparent requirement that a plaintiff must do more to survive summary judgment runs contrary to the Supreme Court's opinion.[274]

B. *Supreme Court Employment Discrimination Trends*

In two recent sexual harassment cases, the Supreme Court expanded the protection over a plaintiff's opportunity to prove her claim in employment discrimination jurisprudence. First, in *Burlington Industries, Inc. v. Ellerth*,[275] the Court held that a plaintiff's claim for damages against her employer is actionable even if she suffered no tangible harm. Second, in *Oncale v. Sundowner Offshore Services*,[276] the Court held that sexual harassment plaintiffs have actionable claims even when it involves same-sex harassers. In this section, I will briefly explain these two Supreme Court decisions and then discuss why the decisions reveal a recent Supreme Court trend to expand the protection over a plaintiff's opportunity to make her claim. I will conclude by arguing that the D.C. Circuit's interpretation of *Hicks* is consistent with this trend because it protects a plaintiff's opportunity to survive summary judgment and thus take her claims to a jury.[277]

The Supreme Court recently held that a plaintiff suing her employer for sexual harassment could recover from the employer even though she did not suffer any tangible employment consequences.[278] In *Burlington Industries, Inc. v. Ellerth*, the plaintiff was subjected to offensive comments and gestures from a vice president who supervised the plaintiff's division.[279] Although several of these comments were phrased as threats to the plaintiff's tangible job benefits, the harasser was not the plaintiff's direct supervisor nor was he high up in the

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271 *See id.*

272 *See id.* at 337–38.

273 *See supra* text accompanying notes 132–152.

274 *See Aka*, 156 F.3d at 1292 (holding that courts should not require plaintiffs to present direct evidence of discrimination in order to prevail) (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3, 717 (1983)).

275 118 S. Ct. 2257 (1998).

276 118 S. Ct. 998 (1998).

277 *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("[T]he plaintiff must . . . have an opportunity to prove . . . that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.").

278 *See Burlington Industries*, 118 S. Ct. at 2270.

279 *See id.* at 2262.

decision-making hierarchy.[280] In fact, during the alleged harassment, the plaintiff received a promotion from the defendant.[281]

The Court noted that Title VII guarantees employees opportunities to prove that they have a discrimination claim and that their employer is liable.[282] Thus, the Court held that even when there are no tangible employment consequences, an employer is liable for actionable hostile environment sexual harassment by a supervisor who has successively higher authority than the plaintiff.[283] However, the Court also held that when no tangible action is taken, an employer has an affirmative defense to liability.[284] Under this affirmative defense, a defendant has the opportunity to show that (1) it exercised reasonable care to prevent and correct the sexual harassment; and (2) that the plaintiff did not reasonably take advantage of these opportunities to avoid harm.[285] If the defendant can successfully make this defense, it will avoid liability.

It is important to note that the Supreme Court held that a defendant must successfully prove both prongs of the affirmative defense before a plaintiff's claim is dismissed.[286] The Court stated that Title VII was designed to encourage the creation of antisexual harassment policies and to ensure that the grievance mechanisms were effective.[287] Although a plaintiff may not suffer any tangible harm from the alleged harassment, an employer still has the obligation to create a harassment-free workplace.[288] By giving defendants an affirmative defense, the Court's decision did acknowledge an important distinction in a defendant's liability depending upon whether tangible harm resulted from the alleged

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[280] *See id.* The alleged harasser was a mid-level manager with the defendant. *See id.* Although the harasser had the authority to make hiring and promotion decisions, his decisions were subject to the approval of his supervisor. *See id.*

[281] *See id.*

[282] *See id.* at 2270.

[283] *See id.*

[284] *See id.*; *see also* Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998). The Supreme Court considered *Faragher* as a companion case to *Ellerth* because it also addressed the issue of employer liability for the harassing actions of one of its supervisors. Because Title VII gives employers an affirmative obligation to prevent discrimination, the Court adopted the same affirmative defense set forth in *Ellerth* for employers when a plaintiff has suffered no tangible employment actions. *See Ellerth*, 118 S. Ct. at 2270.

[285] *See Ellerth*, 118 S. Ct. at 2270.

[286] *See id.* The Supreme Court held that the defendant must show that it exercised reasonable care to prevent and correct the harassment *and* that the plaintiff failed to take advantage of these preventive and corrective opportunities. The Court did not state that the defendant could prove one prong *or* the other. Therefore, it is clear from the Supreme Court's language, the defendant must prove both prongs to successfully make an affirmative defense.

[287] *See id.* at 2270.

[288] *See id.* ("Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context. . . .").

harassment.[289] Nonetheless, the Court concluded that a plaintiff has an actionable sexual harassment claim even if she does not suffer tangible harm, and it required a defendant to prove both prongs of the affirmative defense before that claim of harassment can be dismissed. As a result, the Court ensured that plaintiffs have a fair opportunity to take their sexual harassment claims to a jury.

In another recent sexual harassment case, *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that same-sex sexual harassment is an actionable claim under Title VII.[290] Joseph Oncale was an employee on an oil platform and worked with an eight-man crew.[291] During his employment, he was subjected to sexually humiliating comments, actions, and physical assaults from his male colleagues and supervisors.[292] Although Oncale complained to supervisory personnel, no remedial action was taken.[293] Eventually, Oncale resigned from his position and sued for hostile environment sexual harassment under Title VII.[294]

Both the district court and the Fifth Circuit found that he had no cause of action for alleged harassment from male co-workers. The Supreme Court reversed.[295] The Court noted that Title VII prohibits an employer from discriminating against an individual because of her sex, race, or religion.[296] Based upon this firm antidiscrimination policy, the Court held that Title VII does not prohibit an employee from proving her employer is liable for discrimination simply because her harassers are the same sex.[297]

The Supreme Court's opinion in *Oncale* is significant for two reasons. First, the Court recognized same-sex sexual harassment as an actionable claim under Title VII.[298] Second, the Court extended the protection for a plaintiff's

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[289] *See id.* ("No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action. . . ."). The Court noted that the affirmative defense does not apply in cases of alleged tangible harm from sexual harassment. As a result, the Court made a distinction between the levels of risk of liability an employer faces in the law of sexual harassment. That is, sexual harassment that results in tangible harm deserves a heightened risk of liability for an employer, but sexual harassment that does not result in tangible harm for the plaintiff presents less of a risk of liability.

[290] *See* Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1003 (1998).

[291] *See id.* at 1000–01.

[292] *See id.* at 1001.

[293] *See id.*

[294] *See id.* ("When asked at his deposition why he left Sundowner, Oncale stated 'I felt that if I didn't leave my job, that I would be raped or forced to have sex.'").

[295] *See id.* at 1003.

[296] *See id.* at 1001–02 (citing 42 U.S.C. § 2000e (1994)).

[297] *See id.* at 1002–03.

[298] However, it is important to note that, to date, the Supreme Court has not made actionable an employment discrimination claim based on sexual orientation under Title VII. Therefore, although same-sex sexual harassment is actionable, a distinction between actionable and nonactionable claims will likely be made if it is alleged that the plaintiff was harassed

opportunity to take her discrimination claims to a jury. By expanding the number of actionable sexual harassment claims to include same-sex harassment, the Court expanded the number of plaintiffs who are eligible to bring a discrimination claim under Title VII. As a result, the Supreme Court in *Oncale* ensured that a plaintiff's right to hold her employer liable was protected, and, therefore, expanded her opportunity to prove her claim to a jury.

The Supreme Court's recent opinions in *Ellerth* and *Oncale* demonstrate a trend in employment discrimination jurisprudence: plaintiffs must be afforded broader opportunities to prove discrimination claims against their employers.[299] The D.C. Circuit's interpretation of *Hicks* is consistent with this trend. It interprets *Hicks* as permitting plaintiffs the opportunity to survive the pretext stage[300] with either direct or circumstantial evidence.[301] But the *Aka* analysis took the holding in *Hicks* one step further in order to ensure a plaintiff's opportunity to survive summary judgment at the pretext stage, with circumstantial evidence, is indeed viable. To satisfy the plaintiff's burden of proof—that the defendant's proffered reason is false and that discrimination is the real reason—a plaintiff can rely on circumstantial evidence if proof of pretext combines with evidence from the prima facie case to establish a showing of intentional discrimination.[302] Under *Aka*, a plaintiff establishes this inference when her proof of pretext raises an issue of credibility that, combined with the evidence proving her to be qualified and yet rejected, convinces the trier of fact that the plaintiff was more likely than not a victim of discrimination.[303]

In such situations, the *Aka* analysis gives proof of pretext considerable weight to help establish an inference of discrimination. Moreover, because issues of

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because of her sexual orientation, not because of her sex.

299 *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decision. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise.").

300 *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (holding that plaintiffs "must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision").

301 *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination.").

302 *See id.* at 515 ("[A] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that discrimination was false, *and* that discrimination was the real reason.") (quoting *Burdine*, 450 U.S. at 258) (emphasis added).

303 *See* Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1292–93, 1298–99 (D.C. Cir. 1998) (en banc).

credibility are for a jury to decide, *Aka* ensures that lower courts cannot deny plaintiffs the opportunity to use proof of pretext, and other circumstantial evidence in the record, to survive summary judgment. Therefore, under the D.C. Circuit's *Aka* analysis, *Hicks* did not place too heavy of a burden on plaintiffs to make their claims. Rather, the Supreme Court balanced the plaintiff's burden of persuasion under the *McDonnell Douglas* framework with the plaintiff's opportunity to prove that her employer is liable for discrimination under Title VII. As a result, the D.C. Circuit ensured that *Hicks* could be applied consistently with the recent Supreme Court trend.

C. *Purpose of Antidiscrimination Statutes*

The common element of all antidiscrimination statutes in the employment context is that they provide individuals the "full and fair" opportunity to hold their employers liable for discriminatory animus they encounter in the workplace.[304] For example, Title VII of the 1964 Civil Rights Act prohibits private employers[305] from failing or refusing to hire, discharge, or perform any other employment action for the purpose of discriminating against an individual because of her race, sex, national origin, or religion.[306] Congress enacted a similar provision in the ADEA, which prohibits employers from discriminating against an employee "because of [an] individual's age."[307] In 1990, Congress enacted the ADA to protect an individual's right to provide for themselves economically in order to live selfsufficiently.[308] The 1991 Civil Rights Act expanded the scope of Title VII by providing employment discrimination plaintiffs the right to a jury trial.[309] This was an attempt by Congress to provide plaintiffs better protection from discrimination.[310] Although these statutes only hold employers liable if

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[304] *See McDonnell Douglas*, 411 U.S. at 805.

[305] Title VII defines private employers as those who employ 15 or more employees. *See* 42 U.S.C. § 2000e (1994).

[306] *See* 42 U.S.C. § 2000e-2(a)(1); *see also, e.g.*, *McDonnell Douglas*, 411 U.S. at 801 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.") (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971)).

[307] 29 U.S.C. § 623 (1994). *see also, e.g.*, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 120 (1985) (stating under the ADEA Congress "'broadly prohibit[ed] arbitrary discrimination in the workplace based on age'") (quoting Lorillard v. Pons, 434 U.S. 575, 577 (1978)).

[308] *See* 42 U.S.C. § 12101(a)(8) (1994).

[309] *See* 42 U.S.C. § 1981(a)(1) (1994).

[310] *See id.* Congress explained that it enacted the 1991 Civil Rights Act because it was apparent that new legislation was necessary to give individuals additional protection from employment discrimination. *See* 42 U.S.C. § 1981(c)(2). It stated its purpose was to ensure that the Supreme Court followed its lead in expanding the scope of civil rights statutes to provide

plaintiffs can show that the employers were motivated by intentional discrimination, each statute ensures that individuals at least have the opportunity to prove such a claim. Underlying the prohibition of discrimination based on sex, race, age, and disability is the belief that each individual should be able to work in an environment free from discriminatory animus.[311] The natural consequence of an individual's right to work in a discrimination-free environment is the right for an individual to hold her employer liable if it does not provide her with such an environment.

The D.C. Circuit's interpretation and application of *Hicks* furthers the principles set forth in antidiscrimination statutes. Permitting the use of circumstantial evidence at the pretext stage allows plaintiffs to adequately prove their discrimination claims based upon the evidence that is available to them. Analyzing a plaintiff's burden of proof in the context of issues of credibility protects the plaintiff's opportunity to present circumstantial evidence. Moreover, it ensures that defendants will not be held liable unless proof of a discriminatory animus is shown. That is, regardless of whether a plaintiff presents direct or circumstantial evidence, she must show that the defendant's explanation is false and that discrimination is the real reason. As a result, *Aka v. Washington Hospital Center* ensures that the pretext standard set forth in *Hicks* can be applied consistently with the full and fair opportunities guaranteed in each antidiscrimination statute.

VI. CONCLUSION

A resolution to the debate over how a plaintiff survives summary judgment at the pretext stage has been long overdue. But the D.C. Circuit's decision in *Aka v. Washington Hospital Center* demonstrates that most circuit courts have overlooked the fact that the debate did in fact end with *Hicks*. By interpreting *Hicks* consistently with the Supreme Court's language, the D.C. Circuit shows that a plaintiff has an opportunity to survive summary judgment at the pretext stage, even if she does not have direct evidence. Moreover, the D.C. Circuit demonstrates that the plaintiff's right to hold her employer liable for the discrimination she encounters in the workplace can be balanced with the employer's right not to be held liable unless it actually discriminated. Therefore,

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them "adequate protection" from discrimination. *See* 42 U.S.C. § 1981(c)(3); *see also, e.g.*, H.R. REP. NO. 102-40, pt. 2, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694 (noting the two purposes of the Civil Rights Act of 1991 are to respond to recent Supreme Court decisions that affected individual civil rights protections and to strengthen existing protections and remedies to victims of discrimination).

311 *See, e.g., EEOC Enforcement Guidance on* St. Mary's Honor Center v. Hicks, EEOC Compl. Man. (BNA) No. 186 at N:3363 n.3 (Apr. 12, 1994) (taking the position that a "prima facie case, coupled with a non-credible justification from the employer, is sufficient to support a finding of discrimination.").

with the *Aka* analysis available to all courts, the debate over summary judgment at the pretext stage should come to a halt. More importantly, by applying the *Aka* analysis, all courts can ensure that plaintiffs have a full and fair opportunity to pursue their employment discrimination claims.